Supreme Court, U.S.
FILED
07-1491 31 2007
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

FLUOR ENTERPRISES, INC.,

Petitioner,

v.

REVENUE DIVISION OF THE DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Michigan

PETITION FOR WRIT OF CERTIORARI

PATRICK R. VAN TIFLIN
Counsel of Record
DANIEL L. STANLEY
HONIGMAN MILLER SCHWARTZ AND COHN LLP
222 North Washington Square, Suite 400
Lansing, Michigan 48933-1800
(517) 484-8282

TODD F. MAYNES, P.C.
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, Illinois 60601-6636
(312) 861-2485

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342 2831

QUESTION PRESENTED

Whether the Michigan Supreme Court properly reversed the Michigan Court of Appeals in ruling that a Michigan tax apportionment statute does not violate the Commerce Clause of the U.S. Constitution when that statute is interpreted to classify, as Michigan sales, receipts for services both parties agree were rendered outside Michigan, thereby permitting double taxation by allowing multiple states to classify the same receipts as local sales?

LIST OF PARTIES

The parties to the appellate proceeding in the Michigan Supreme Court, whose decision below is sought to be reviewed, are:

Fluor Enterprises, Inc., Appellee/Cross-Appellant below.

Revenue Division, Department of Treasury, State of Michigan, Appellant/Cross-Appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner is wholly owned by Fluor Corporation, a publicly held corporation. No publicly held company owns 10% or more of Fluor Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Statutory Scheme	4
B. The Michigan Decisions Below Interpreting Section 53(c)	6
ARGUMENT	8
A. Michigan's Position Results in Unconstitutional Double Taxation and Violates This Court's Established Precedents	8
B. The Court's Decision Fails the Internal Consistency Test	12
C. The Court's Decision Fails the Requirement of External Consistency	14
D. This Court Should Hear this Case to Prevent Further Discrimination Against Interstate Commerce	15
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Armco, Inc. v. Hardesty, 467 U.S. 638 (1984) 10

Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318 (1977) 14

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 10

Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983) 4, 13, 14

Fluor Enterprises, Inc. v. Dep't of Treasury, 265 Mich. App. 711, 697 N.W.2d 539 (2005) 1

Fluor Enterprises, Inc. v. Revenue Div., Dep't of Treasury, 477 Mich. 170, 730 N.W.2d 722 (2007) ..... *passim*

Goldberg v. Sweet, 488 U.S. 252 (1989) 1, 11

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995) 10, 11

Trinova Corp. v. Michigan Dep't of Treasury, 498 U.S. 358 (1991) 3, 15

STATUTES

28 U.S.C. § 1257(a) 2

MICH. COMP. LAWS ANN. § 208.31 ..... 2, 4

MICH. COMP. LAWS ANN. § 208.41 ..... 2, 4, 5

MICH. COMP. LAWS ANN. § 208.45 2

MICH. COMP. LAWS ANN. § 208.51 ..... 2, 5

MICH. COMP. LAWS ANN. § 208.52 2

TABLE OF AUTHORITIES – Continued

Page

MICH. COMP. LAWS ANN. § 208.53 5

MICH. COMP. LAWS ANN. § 208.53(c) ..... *passim*

RULES

SUP. CT. R. 13.1 2

CONSTITUTIONAL PROVISIONS

U.S. CONST. Art. 1, § 8 2

P[illegible]TION FOR WRIT OF CERTIORARI

Petitioner Fluor Enterprises, Inc. ("Fluor") respectfully requests that the Court issue a Writ of Certiorari to review the judgment of the Michigan Supreme Court that interpreted a Michigan tax apportionment statute to classify, as Michigan sales, receipts for services that were unequivocally rendered outside Michigan, thereby permitting double taxation by allowing multiple states to classify the same receipts as local sales.

OPINIONS AND ORDERS BELOW

The opinion of the Michigan Supreme Court sought to be reviewed is *Fluor Enterprises, Inc. v. Revenue Div., Dep't of Treasury*, 477 Mich. 170, 730 N.W.2d 722 (2007). App. 1-28. The opinion of the Michigan Court of Appeals is *Fluor Enterprises, Inc. v. Dep't of Treasury*, 265 Mich. App. 711, 697 N.W.2d 539 (2005). App. 30-49. The unreported judgment entered by the Michigan Court of Claims is Court of Claims Docket No. 02-27-MT. App. 50-52. The unreported Decision and Order of Determination of the Michigan Revenue Commissioner is Docket No. 19950036. App. 67-73. The unreported recommendation of the Department of Treasury's Hearing Referee is Docket No. 19950036. App. 58-66.

JURISDICTION

The Michigan Supreme Court entered its final judgment on May 2, 2007. Petitioner Fluor seeks review of that judgment on a Writ of Certiorari. The Petition is timely filed pursuant to SUP. CT. R. 13.1. The jurisdiction of the Court is properly invoked pursuant to 28 U.S.C. § 1257(a) to review, on writ of certiorari, the final judgment of the highest court of a state where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution of the United States. In this case, the Michigan Court of Appeals ruled that the Michigan statute was in fact unconstitutional.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves consideration of U.S. CONST. Art. 1, § 8, set forth in App. 74; MICH. COMP. LAWS ANN. § 208.31 (West 2005), App. 74-75; MICH. COMP. LAWS ANN. § 208.41 (West 2005), App. 76; MICH. COMP. LAWS ANN. § 208.45 (West 2005), App. 76-77; MICH. COMP. LAWS ANN. § 208.51 (West 2005), App. 77; MICH. COMP. LAWS ANN. § 208.52 (West 2005), App. 78; and MICH. COMP. LAWS ANN. § 208.53 (West 2005), App. 78-79.

STATEMENT OF THE CASE

During the years at issue, Fluor was a multistate, multinational engineering, construction, and technical service company with its principal place of business in California. Fluor was engaged in providing construction services in Michigan and Fluor properly reported the

receipts from such services as being from Michigan. With respect to these projects, Fluor did not engage in any engineering, architectural planning or design services within the state of Michigan, but instead performed such services at its facilities in South Carolina, Texas, Illinois, and California. The Michigan Supreme Court ruled that Fluor's receipts from these engineering, architectural and design services performed by Fluor employees entirely *outside* of Michigan (the "Out-of-State Receipts") must be considered to be "Michigan sales" for purposes of apportioning the Michigan Single Business Tax ("SBT"), solely because the construction project associated with those services was located in Michigan. This petition seeks review of that decision. There are no disputed facts. The case was decided based on a Stipulation of Facts, set forth in App. 53-57.

There is no dispute here about Michigan's right to tax receipts that arose from services performed in the state of Michigan. But the Michigan Supreme Court interpreted the Michigan SBT apportionment statute so as to treat the Out-of-State Receipts as "Michigan sales" despite the stipulated fact that the services that gave rise to the receipts were performed entirely outside Michigan. Michigan is not merely claiming an apportioned amount of out-of-state receipts as part of Fluor's tax base, which this Court has upheld.[1] What makes this case unprecedented is that Michigan is reaching ever farther, classifying out-of-state receipts as "Michigan sales" when calculating the apportionment factor to be applied to Fluor's tax base (which includes the Out-of-State Receipts). This inevitably

[1] *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358 (1991).

results in double taxation, since the states where those services (i.e., the design, engineering, and planning) are performed will also classify those receipts as local sales.

What makes the Michigan position especially repugnant to the Commerce Clause is that Michigan would claim the Out-of-State Receipts as "Michigan sales" if the situation were reversed (i.e., if the engineering, architectural planning or design services were performed in Michigan for a construction project in another state). Indeed, any state that interpreted its tax apportionment statutes as did the Michigan Supreme Court would claim the Out-of-State Receipts as belonging to its state if either (i) any of the engineering, architectural planning or design services were performed in the state or (ii) the construction project was located in the state. Thus, the Michigan decision conflicts with this Court's constitutional requirement that a state tax apportionment scheme be "internally consistent." That is, if every state adopted the same statute, a taxpayer's unitary business income would be subject to double, triple or quadruple taxation.[2] This type of multiple taxation unequivocally violates the Commerce Clause.

A. The Statutory Scheme

Michigan SBT is imposed upon any taxpayer "doing business" in Michigan. MICH. COMP. LAWS ANN. § 208.31 (West 2005). This includes companies that do all their business in Michigan as well as companies, like Fluor,

---

[2] *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

whose business activity is predominantly outside Michigan.

In order to determine the proper SBT for a multistate taxpayer, the tax base must be apportioned to Michigan and to the other states where the taxpayer operates. MICH. COMP. LAWS ANN. § 208.41 (West 2005) provides this apportionment based on the taxpayer's relative amount of sales, property and payroll in Michigan and other jurisdictions.

The issue in this case concerns the "sales factor," which is the ratio of "Michigan sales" divided by total sales. MICH. COMP. LAWS ANN. § 208.51 (West 2005) provides: "The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year."

MICH. COMP. LAWS ANN. § 208.53 (West 2005) determines whether a taxpayer's sales of services are "Michigan sales." That section provides:

> Sec. 53. Sales, other than sales of tangible personal property, are in this state if [sic]:
>
> (a) The business activity is performed in this state.
>
> (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.
>
> (c) Receipts derived from services performed for planning, design, or construction activities

> within this state shall be deemed Michigan receipts [sic].

This case concerns subsection (c), MICH. COMP. LAWS ANN. § 208.53(c) ("Section 53(c)").

B. The Michigan Decisions Interpreting Section 53(c)

The Michigan Court of Claims held that Section 53(c) means what it says – that receipts for certain activities performed "within this state" shall be deemed Michigan receipts. Effectively, the Court of Claims interpreted Section 53(c) as meaning:

> Receipts derived from services performed for planning . . . activities within this state shall be deemed Michigan receipts.
>
> Receipts derived from services performed for . . . design . . . activities within this state shall be deemed Michigan receipts.
>
> Receipts derived from services performed for . . . construction activities within this state shall be deemed Michigan receipts.

Thus, receipts derived from planning activities, design activities, and construction activities are deemed Michigan receipts only if the activities to which the receipts relate occur within Michigan. App. 37-38.[3] Under this interpretation, Michigan could only claim receipts for services

[3] Indeed, the Department's own hearing referee, who is an attorney, adopted this construction of Section 53(c) in her Recommendation to the Revenue Commissioner. App. 65-66. The Revenue Commissioner overruled the Hearing Referee, claiming that the statute allowed Michigan to "pull[] in" to Michigan, and tax, the Out-of-State Receipts.

rendered within Michigan as "Michigan receipts" and there was no violation of the Commerce Clause.

The Michigan Court of Appeals ruled for Fluor also, but on different grounds. The Court of Appeals interpreted Section 53(c) to require Michigan to treat Fluor's Out-of-State Receipts as "Michigan sales" for apportionment purposes, but held that this result violated the Commerce Clause of the U.S. Constitution. App. 42, 48. The Court held that the same receipts under Section 53(c) could be claimed as local sales by more than one state for apportionment purposes, violating the internal consistency requirement of the Commerce Clause. App. 48.

The Michigan Supreme Court reversed. The Court held that it "must look at whether the receipts are derived from 'services performed for' one of the enumerated activities, with no geographic limit on where the services took place, and no limit on what type of services are being performed." App. 8. The Court then determined that the Out-of-State Receipts were "Michigan receipts" under Section 53(c), despite the fact the Out-of-State Receipts were earned for services rendered outside Michigan. Specifically, the Court held:

> [P]laintiff engaged in architectural and engineering services performed for various Michigan construction activities. Because these actions constitute 'services performed' for 'construction activities,' and those 'construction activities' took place 'within this state,' the state may tax plaintiff's architectural and engineering services. Although plaintiff attempts to describe what it did as performing design and planning activities, and that those **activities took place in California**, this ignores language in the statute that

> indicates receipts are paid for services, and services are engaged in for activities. It is undisputed that plaintiff performed its architectural and engineering services in support of 'construction activities' that occurred in Michigan. Consequently, plaintiff's services fall within the language of MCL 208.53(c), and plaintiff's receipts for such services are taxable in Michigan. Plaintiff's attempt to construe its services as 'planning or design activities' fails to recognize that plaintiff performed its services for 'construction activities' within the state of Michigan. The receipts, pursuant to MCL 208.53(c), are therefore deemed Michigan receipts.
>
> App. 8-9 (emphasis added).

The Court thus found that all of the receipts from the activities in question were Michigan sales, even the receipts for the services rendered patently outside Michigan. The majority then determined that its interpretation of Section 53(c) would not violate the internal consistency required by the Commerce Clause because, according to the state court, the architectural and engineering services were performed "in support of" the construction activity, and thus it was appropriate to source all of the receipts to Michigan.

ARGUMENT

A. Michigan's Position Results in Unconstitutional Double Taxation and Violates This Court's Established Precedents.

The Michigan Supreme Court interpreted Section 53(c) to deem, as "Michigan receipts," receipts derived

from: (1) services performed for planning activities within this state; (2) services performed for design activities within this state; and (3) services performed for construction activities within this state. App. 7-8. The Court held that the Out-of-State Receipts[4] were "performed for construction activities within [Michigan]" and therefore deemed Michigan receipts. App. 8-9.

On its face, this interpretation may seem somewhat reasonable. That is, if a construction project occurs in Michigan, perhaps also the design and engineering services for that project should also be sourced to Michigan. But the Michigan statute, as interpreted and applied by the Michigan Supreme Court, does much more. The Michigan statute, as interpreted by the Michigan Supreme Court, would render the same sourcing result if the construction project were outside Michigan and the design and engineering services were inside Michigan. This is so because the receipts would then be "derived from services performed for design activities within [Michigan]." Consequently, if other states employed the same statute and interpretation as Michigan, every state where either the engineering, architecture, design or construction occurred could classify 100% of the sales receipts as sourced to that state. The unavoidable result would then be double, triple, or even quadruple taxation. The U.S. Constitution bars this possibility.

---

[4] Fluor is not contesting that its receipts for services rendered in Michigan should not be considered Michigan sales. As stipulated by the parties, Fluor reported its receipts for services rendered in Michigan as "Michigan sales" and those receipts are not at issue in this case. App. 54, ¶ 6.

This Court has consistently applied the four-prong test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), in determining whether imposition of a state tax upon interstate commerce violates the Commerce Clause. Under *Complete Auto*, a state tax does not satisfy the Commerce Clause unless all of the following requirements are met: (1) the tax is applied to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to services provided by the state. The Michigan Court of Appeals found that the state statute at issue violates this four-part test because the tax was not fairly apportioned between the different states where the various services at issue were rendered.

To be fairly apportioned under the Commerce Clause – the second prong of the *Complete Auto* test – a state tax must be both internally and externally consistent. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). "Internal consistency" simply looks to "the structure of the tax" to determine if the "State is attempting to take more than its fair share of taxes from . . . interstate transaction[s]." *Id.* at 185. To be internally consistent, a tax statute must be drafted in such a manner that, if other states adopted the identical statute, it "would add no burden to interstate commerce that intrastate commerce would not also bear." *Id.* A statute that fails the internal consistency test is unconstitutional because its structure creates the risk of greater taxation on interstate commerce; it does not matter whether a greater tax is actually imposed. *See, e.g., Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). If a tax fails to satisfy the internal consistency test, it is unconstitutional, and one need not

also consider the external consistency test. *Jefferson Lines, supra,* 514 U.S. at 185.

External consistency looks "to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State. * * * [T]he threat of real multiple taxation * * * may indicate a State's impermissible overreaching." *Jefferson Lines, supra,* 514 U.S. at 185 (1995) (internal citations omitted). External consistency is "essentially a practical inquiry" for determining "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg v. Sweet*, 488 U.S. 252, 262, 264 (1989).

It is not difficult here to fathom a perfectly legitimate apportionment method for the services at issue that would meet the internal and external consistency tests. If Michigan desires to source all of the receipts from a construction project to Michigan because the construction project occurs in Michigan, so be it. If Michigan desires to source all of the receipts from a construction project occurring outside of Michigan to Michigan because the design and engineering occurs in Michigan, so be it. If Michigan desires to apportion the receipts from such activities based on the portion of the activity that occurs in Michigan (as Fluor believes is most appropriate given the language of Section 53(c)), so be it. But what is patently unconstitutional is what Michigan seeks to do here, i.e., to source 100% of the receipts at issue to Michigan if any of the design, engineering, planning or construction were to occur in Michigan. That methodology, destined surely to result in multiple

taxation of the same income, cannot stand and is blatantly inconsistent with this Court's prior precedent.

B. The Court's Decision Fails the Internal Consistency Test.[5]

The Michigan Supreme Court decision, in reversing the Michigan Court of Appeals decision, simplistically asserted that its interpretation of Section 53(c) meets the requirement of internal consistency because planning activity, design activity, or construction activity can take place only in one state at a time and, therefore, only one state can tax the receipt for the "services performed for those activities." See App. 12. This thinking fails to recognize that "planning," "design," and "construction" are all activities that must be performed for (and are therefore related to) the very same project. Thus, for example, for a single construction project Fluor may perform services for planning activities in California, services for design activities in Texas and services for construction activities in Michigan. If the states of Texas, California and Michigan all enacted Section 53(c) and employed the interpretation of the Court below, all three states would claim all receipts related to the project. Texas would claim that all the receipts were "derived from services performed for planning activities within [Texas]." California would claim that all the receipts were "derived from services performed

[5] Fluor raised and briefed the issue of the constitutionality of Section 53(c) and, specifically, the issue of internal consistency, to the Michigan Court of Claims, the Michigan Court of Appeals, and the Michigan Supreme Court. The Michigan Court of Appeals held that Section 53(c) violated the internal consistency test. App. 48. The Michigan Supreme Court majority addressed the issue and held that Section 53(c) did not violate the internal consistency test. App. 12.

for design activities within [California]." And Michigan would claim, as it has here, that all the receipts were "derived from services performed for construction activities within [Michigan]." Thus, if the planning and design for a project took place in multiple states, as it did here, every one of those states would claim all the receipts related to that project because the out-of-state services were "performed for" the particular activity that took place in that state.

The Michigan Supreme Court's interpretation of Section 53(c) clearly violates the requirement of internal consistency. Under this analysis, a tax is internally consistent if it is structured so that, if every state were to impose an identical tax, no multiple taxation would result. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983). If Section 53(c) means that a state can characterize, as a local sale, receipts for services performed "for planning, design or construction activities," "with no geographic limit on where the services took place, and no limit on what type of services are being performed," (App. 8), then every state with such a provision would claim the same receipts. The resulting multiple taxation violates the internal consistency test of fair apportionment. If every state had a similar apportionment regime, Fluor would be bound to report the same receipts in California, South Carolina, Illinois, Texas and Michigan because it had planning, design or construction activities in those states. It is hard to imagine a more blatant example of internal inconsistency.

C. The Court's Decision Fails the Requirement of External Consistency.[6]

In addition to violating the internal consistency requirement, Section 53(c), as interpreted by the Michigan Supreme Court, also violates the "second and more difficult requirement"[7] of fair apportionment – external consistency. Under the external consistency requirement, state tax apportionment factors must "reflect a reasonable sense of how income is generated." External consistency looks to the economic justification for the state's claim upon the value taxed to discover whether a state's tax reached beyond that portion of value that is fairly attributable to activity within the taxing state.[8]

The parties have stipulated that the Out-of-State Receipts were received for engineering, architectural planning and design services that were rendered in South Carolina, Texas, Illinois, and California. Thus, there is clear and cogent evidence that Michigan is attempting to assess tax "out of all appropriate proportion to the business transacted in the state" and that "the state's tax reaches beyond that portion of value that is fairly attributable to activity within the taxing state." The Michigan Supreme Court's interpretation thus clearly violates the external consistency requirement.

---

[6] The Michigan Supreme Court majority decision below held that Section 53(c) allowed the inclusion of out-of-state revenues into Fluor's sales factor and that such a result was constitutionally permissible. No other court below reached this result, which raises for the first time the specter of a violation of external consistency; thus, this case now presents violations of both branches of the fair apportionment test.

[7] *Container Corp., supra,* 463 U.S. at 169.

[8] *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

D. This Court Should Hear this Case to Prevent Further Discrimination Against Interstate Commerce.

The Court has long recognized that States often attempt to improperly use their powers of taxation to export tax burdens and import tax revenues, and that the Commerce Clause prohibits such attempts. *Trinova Corp. v. Michigan Dep't of Treasury,* 498 U.S. 358. 374 (1991). Such attempts are by no means an endangered species, at least based on the litany of states seeking to tax foreign commerce based on the most tenuous of connections. The case at bar presents this Court with an extraordinary opportunity to clarify the law in this area, and to send a reminder to both states and taxpayers of where appropriate lines should be drawn.

In this case, the Michigan Court of Claims found that the statute at issue should be interpreted in a rational fashion so as to preserve the constitutionality of Section 53(c). The Michigan Court of Appeals adopted a different interpretation, but found that the statute at issue was unconstitutional as written. But the Michigan Supreme Court, as the ultimate arbiter of what the Michigan statute actually says, determined that the statute at issue sourced 100% of Fluor's receipts from the out-of-state services to Michigan, regardless of whether the services at issue were design, construction, planning or engineering. Such an interpretation is exactly the type of overzealous tax collection – inevitably leading to double, triple or quadruple taxation – that this Court has condemned.

CONCLUSION

As the Court has held, a violation of internal consistency demonstrates that, as a matter of law, a state is attempting to take more than its fair share of taxes from the interstate transaction. Allowing such tax schemes to fester unchecked is antithetical to interstate commerce. For this reason, and the reasons given herein, Fluor respectfully requests that the Court grant its petition for a writ of certiorari.

Respectfully submitted,

PATRICK R. VAN TIFLIN
Counsel of Record
DANIEL L. STANLEY
HONIGMAN MILLER SCHWARTZ AND COHN LLP
222 North Washington Square, Suite 400
Lansing, Michigan 48933-1800
(517) 484-8282

TODD F. MAYNES, P.C.
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, Illinois 60601-6636
(312) 861-2485

Michigan Supreme Court
Lansing, Michigan

Opinion	Chief Justice:	Justices:
	Clifford W. Taylor	Michael F. Cavanagh
		Elizabeth A. Weaver
		Marilyn Kelly
		Marua D. Corrigan
		Robert P. Young, Jr.
		Stephen J. Markman

FILED MAY 2, 2007

FLUOR ENTERPRISES, INC.,

Plaintiff-Appellee/
Cross-Appellant

v

REVENUE DIVISION,
DEPARTMENT OF TREASURY,
STATE OF MICHIGAN,

Defendant-Appellant/
Cross-Appellee.

No. 129149

BEFORE THE ENTIRE BENCH

TAYLOR, C.J.

This case requires us to construe the provision of the Single Business Tax Act (SBTA) found at MCL 208.53 that explicates how to allocate sales of intangible personal property so as to determine whether they can be taxed by Michigan. Specifically, we must decide whether receipts for plaintiff's services, performed entirely outside Michigan for construction projects located in Michigan, are deemed taxable sales under the statute and, if they are, whether that interpretation of the statute results in the

statute's being unconstitutional as a violation of the Commerce Clause, US Const, art I, § 8, cl 3. The Court of Appeals held that the services were taxable but that this section of the statute violates the Commerce Clause of the constitution and thus is unenforceable. *Fluor Enterprises, Inc v Dep't of Treasury*, 265 Mich App 711; 697 NW2d 539 (2005). We reverse in part and affirm in part, agreeing that such receipts are taxable under the statute, but holding that this provision is not unconstitutional and thus is enforceable.

I

The Court of Appeals accurately summarized the facts in this case:

> The facts in this case are undisputed. The receipts at issue were received by plaintiff for engineering and architectural services related to real estate improvement projects constructed in Michigan. The services were performed by plaintiff's employees at out-of-state facilities. Plaintiff timely filed single business tax (SBT) returns for the years at issue. However, plaintiff did not report the receipts at issue as Michigan receipts. Following an audit, defendant issued three bills for taxes due (intents to assess) totaling $182,312.
>
> Plaintiff requested an informal conference with defendant's Hearings Division. Following an informal conference, the department referee issued a recommendation to the Commissioner of Revenue. The hearing referee agreed with plaintiff's interpretation of § 53(c). However, the Commissioner of Revenue disagreed with the referee's analysis and directed that the taxes be assessed as originally determined. Following the

> commissioner's order, defendant issued three bills for taxes due (final assessments) for total tax and interest of $343,340.96, which plaintiff then paid under protest. Plaintiff subsequently paid an additional $3,077.35 in interest.
>
> Plaintiff filed this action in the Court of Claims to recover $346,618.31 paid under protest plus additional statutory interest, costs, and attorney fees. The parties both filed motions for summary disposition. Plaintiff moved for summary disposition pursuant to MCR 2.116(A) (judgment on stipulated facts). Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The Court of Claims concluded that the plain language of the statute supported plaintiff's position and entered judgment in favor of plaintiff, ordering defendant to pay $346,418.31 and interest. [*Id.* at 713-714.]

On appeal, the Court of Appeals reversed with regard to the Court of Claims construction of § 53 of the SBTA and held that the receipts for services performed for a construction project located in Michigan, even if the services were performed in another state, were "Michigan receipts," but that this section of the statute was unconstitutional as a violation of the Commerce Clause.

Defendant sought leave to appeal in this Court, seeking to have the ruling of unconstitutionality reversed. Plaintiff sought leave to cross-appeal, arguing that the Court of Appeals construction of the statute was erroneous. We granted the parties' applications for leave to appeal and cross-appeal.[1]

---

[1] 474 Mich 1097 (2006).

II

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006). Likewise, questions of constitutional and statutory construction are reviewed de novo by this Court. *Id.* When interpreting a statute, we examine the language of the statute itself. "If the statute is unambiguous it must be enforced as written." *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519; 676 NW2d 207 (2004).

III

The SBTA, MCL 208.1 *et seq.*, is a business activity tax that was enacted "to provide for the imposition, levy, computation, collection, assessment and enforcement . . . of taxes on certain commercial, business, and financial activities. . . ." 1975 PA 228. As provided by the act:

> "Business activity" means a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others. . . . [MCL 208.3(2).]

Thus, the act by definition encompasses taxation of services that are performed not only within the state ("engaged in . . . within this state") but also some that are performed out of state, as long as the reason those services are engaged in has its source within this state ("caused to be . . . engaged in [] within this state"). When business

activity is partially performed out of state, the statute establishes a system of apportionment, MCL 208.40 *et seq.*, so that only those receipts appropriate to be taxed in Michigan are taxed here. Apportioning is based on a formula whereby a fraction reflecting the ratio of Michigan activity to out-of-state activity, i.e., Michigan sales/total sales, is established. *Jefferson Smurfit Corp v Dep't of Treasury*, 248 Mich App 271, 273 n 1; 639 NW2d 269 (2001). In this case, where the sales factor is at issue, the question is which sales of plaintiff's total sales should be included in its "Michigan sales" numerator.[2]

To ascertain whether receipts for intangible property, such as services, comprise "Michigan sales," we turn to MCL 208.53. It provides:

> Sales, other than sales of tangible personal property, are in this state if:
>
> (a) The business activity is performed in this state.
>
> (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business

---

[2] See MCL 208.51:

> (1) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year.
>
> (2) For a foreign person, the sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer in the United States during the tax year.

> activity is performed in this state than is performed outside this state.
>
> (c) Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts.

Plaintiff asserts, and the Court of Claims agreed, that § 53(c) deems receipts for services taxable as Michigan receipts only if the services are performed within this state. That is, the phrase "within this state" modifies not just "activities" but also "planning," "design," and "construction." Because plaintiff's planning and design services were not performed within this state, plaintiff argues, its receipts for those services should not be taxable. We respectfully disagree with this approach. Plaintiff is essentially rewriting the statute so that "within this state" modifies "services performed." This is not how the statute reads.

The subject of § 53(c) is "receipts"; the statute states that certain "receipts" "shall be deemed Michigan receipts." Section 53(c) then narrows the category of receipts that will be "deemed Michigan receipts." The term "receipts" is modified by the phrase "derived from services performed." Thus, the statute specifies that to be "deemed Michigan receipts," "receipts" must be "derived from services performed." Section 53(c) further specifies which "services performed" will allow "receipts" to be "deemed Michigan receipts," namely, services performed "for planning, design, or construction activities within this state." The prepositional phrase "for planning, design, or construction activities" modifies "performed," and indicates the purpose for which the services must be performed. The phrase "within this state" modifies the term "activities."

The term "activities" is the object of the preposition "for," and is modified by the preceding phrase "planning, design, or construction." The use of the term "or" in the phrase "planning, design, or construction" indicates that all three terms are correlative to each other. The term "construction" is clearly an adjective modifying the term "activities." Consequently, the terms "planning" and "design" are also adjectives that modify the term "activities." Parsing the grammar otherwise would make "construction" an adjective, and "planning" and "design" nouns, and a grammatical construction that would make correlative terms unequal in this way should be avoided. Therefore, "activities" is modified by each of the terms "planning," "design," and "construction." As a result, the statute indicates that "[r]eceipts derived from" "services performed for planning activities within this state," "services performed for design activities within this state," and "services performed for construction activities within this state" are to be "deemed Michigan receipts." The statute thus subjects to taxation receipts for "services performed" in support of planning activities, design activities, or construction activities, as long as those activities take place "within this state." The statute does not state that the "services performed" must themselves be performed "within this state" in order for "[r]eceipts derived from" such services to be deemed Michigan receipts.[3] Consequently, we must look at whether

---

[3] The concurrence finds the statute ambiguous because other interpretations have been proposed, citing *People v Adair*, 452 Mich 473, 479; 550 NW2d 505 (1996), for the rule that ambiguity exists when there can be reasonable disagreement over a statute's meaning. However, our current law is set forth in *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004), where this Court held: "[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision or when it is *equally* susceptible to

(Continued on following page)

the receipts are derived from "services performed for" one of the enumerated activities, with no geographic limit on where the services took place, and no limit on what type of services are being performed.[4]

The statute thus establishes a two-part analysis. First, it must be determined whether the actions sought to be taxed were "services performed" for "planning activities," "design activities," or "construction activities." Second, if the actions are "services performed" for such activities, it must be determined whether the activities occurred "within this state." If the activities occurred "within this state," then the actions are taxable under MCL 208.53(c). If the activities did not occur in Michigan, then the actions are not taxable under MCL 208.53(c).

In this case, plaintiff engaged in architectural and engineering services performed for various Michigan construction activities. Because these actions constitute "services performed" for "construction activities," and

---

more than a single meaning." (citation omitted; emphasis in original). "[A] finding of ambiguity is to be reached only after 'all other conventional means of [] interpretation' have been applied and found wanting." *Id.* at 165, quoting *Klapp v United Ins,* 468 Mich 459, 474; 663 NW2d 447 (2003). The meaning of MCL 208.53 can be determined from the text of the statute and by using conventional means of statutory construction. Nothing in the statute irreconcilably conflicts or makes it equally susceptible to more than one meaning.

[4] We note that the phrase "deemed Michigan receipts" itself reinforces the extraterritoriality of this provision, because this phrase suggests that receipts for activities that *would not ordinarily be* considered Michigan receipts will be considered, or treated as, Michigan receipts for purposes of the statute. Because receipts for Michigan activities would *ordinarily be* considered Michigan receipts, this implies that receipts that are "deemed Michigan receipts" are for activities that take place outside the state.

those "construction activities" took place "within this state," the state may tax plaintiff's architectural and engineering services. Although plaintiff attempts to describe what it did as performing design and planning *activities*, and that those activities took place in California, this ignores language in the statute that indicates receipts are paid for *services*, and services are engaged in *for activities*. It is undisputed that plaintiff performed its architectural and engineering services in support of "construction activities" that occurred in Michigan. Consequently, plaintiff's services fall within the language of MCL 208.53(c), and plaintiff's receipts for such services are taxable in Michigan. Plaintiff's attempt to construe its services as "planning or design activities" fails to recognize that plaintiff performed its services for "construction activities" within the state of Michigan. The receipts, pursuant to MCL 208.53(c), are therefore deemed Michigan receipts.

IV

Having determined that the statute allows plaintiff's receipts for services to be taxed as Michigan receipts, we turn to the question whether such a construction results in a tax that violates the Commerce Clause, US Const, art I, § 8, cl 3. As we have explained before, a state tax withstands scrutiny under a Commerce Clause challenge and will be found constitutionally valid if it meets the four-pronged test articulated in *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977). See *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 415, 488 NW2d 182 (1992). A valid tax: (1) is applied to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate

against interstate commerce, and (4) is fairly related to the services provided by the state. *Id.*

Plaintiff first argues that it does not have a sufficient nexus with this state to be subject to the tax. "The requisite 'nexus' is supplied if the corporation avails itself of the 'substantial privilege of carrying on business' within the State. . . ." *Mobil Oil Corp v Comm'r of Taxes of Vermont*, 445 US 425, 437; 100 S Ct 1223; 63 L Ed 2d 510 (1980). "'[The] fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction.'" *Id.*, quoting *Wisconsin v J C Penney Co*, 311 US 435, 445; 61 S Ct 246, 85 L Ed 267 (1940). See also *Caterpillar, Inc*, *supra* at 416-417. The receipts at issue in this case were for services that plaintiff provided for construction projects in Michigan, and therefore "the incidence of the tax as well as its measure is tied to the earnings which the State . . . has made possible. . . ." *J C Penney Co*, *supra* at 446. Thus, there is a substantial nexus between the state and the activity being taxed.

Also at issue in this case is whether the tax imposed by MCL 208.53(c) is fairly apportioned. That is, the tax is not fairly apportioned if it allows Michigan to tax more than its fair share of interstate business activity. *Caterpillar*, *supra* at 417. A tax is not fairly apportioned if it is not internally consistent. "'To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result,' . . . or, in other words, no more than one hundred percent of the taxpayer's business activity would be taxed." *Id.* at 419, quoting *Goldberg v Sweet*, 488 US 252, 261; 109 S Ct 582;

102 L Ed 2d 607 (1989).[5] As the United States Supreme Court has said, internal consistency

> simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax. [*Oklahoma Tax Comm v Jefferson Lines, Inc*, 514 US 175, 185; 115 S Ct 1331; 131 L Ed 2d 261 (1995).]

In applying the "internal consistency" test, the United States Supreme Court has considered the entire taxing scheme, and not simply the individual tax provision at issue in a specific case. See, e.g., *D H Holmes Co, Ltd v McNamara*, 486 US 24; 108 S Ct 1619; 100 L Ed 2d 21 (1988) (considering a provision of the larger tax scheme). If the entirety of MCL 208.53 is considered, the statute is internally consistent. When we survey the statute as a whole, we conclude that § 53(c) is a more specific exception to the general subsections that precede it (§§ 53[a] and 53[b]). See, e.g., *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002) ("'[W]here a statute contains a general provision and a specific provision, the specific provision controls.'" [Citation omitted.]). In other words, § 53(a) applies to business activity that is solely performed

---

[5] A taxing statute must also be externally consistent, *Caterpillar, Inc, supra* at 419, but because plaintiff does not challenge this, we examine only its internal consistency.

in Michigan; § 53(b) applies to business activity that occurs both in and outside Michigan; and § 53(c) applies a special rule to planning, design, and construction activities, which is that as long as the services are performed for one of those activities, and the activity is located within this state, the receipts for the services are taxable regardless of where the services are performed. This language excepts certain receipts from the broad rules of § 53(a) and (b). It is, then, a specific exception to a general rule and falls within the *Jones* test. Therefore, if California had a tax statute identical to MCL 208.53, in order to determine whether California could tax plaintiff's receipts for the services in this case, it would first have to consider whether the services were performed for planning activities, design activities, or construction activities. Because the services in this case were performed for construction activities, California would be precluded from considering whether its counterpart to either § 53(a) or (b) allowed the receipts for the services to be taxed, because the more specific provisions of § 53(c) would govern. Having determined that the services were performed for "construction activities," California would then consider whether these activities occurred within that state. Because the construction activities, in fact, occurred in Michigan, California would be unable to tax these under its counterpart statute. Consequently, because the planning activity, design activity, or construction activity can take place only in one state at a time, only one state can tax the receipts for the "services performed for" those activities. Therefore, if every state had a counterpart statute to MCL 208.53, interstate commerce would not be unfairly burdened or placed at any disadvantage. Therefore, because MCL 208.53 does not discriminate against interstate commerce, the statute does not violate the "internal consistency" test.

V

We conclude that MCL 208.53 is not ambiguous and that plaintiff's receipts for the services are taxable, regardless of where the services occurred, because they were performed for construction projects located in Michigan. We also hold that this interpretation does not violate the "fair apportionment" prong of the Commerce Clause because the statute is internally consistent. Likewise, we hold that plaintiff and its taxed activity have a substantial nexus with this state. We therefore affirm in part the Court of Appeals judgment but reverse it in part with regard to the analysis of fair apportionment, and we remand the case to the Court of Claims for further proceedings not inconsistent with this opinion.

Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman

KELLY, J. (*concurring*).

This case involves the Michigan single business tax (the SBT). There are two issues. The first is whether the Single Business Tax Act (SBTA), at MCL 208.53(c), allows the defendant Department of Treasury to characterize receipts from planning and design services rendered entirely outside Michigan as Michigan sales. If it does, we must also address whether this interpretation renders the statute unconstitutional as violative of the Commerce Clause. US Const, art I, § 8, cl 3. I conclude that MCL 208.53 is ambiguous and that plaintiff's receipts for services are taxable. I conclude, also, that the statute does not violate the Commerce Clause.

Although I agree with the majority's decision to affirm in part and reverse in part the judgment of the Court of Appeals, I write separately because I disagree with the majority's statutory interpretation. In addition, I see flaws in its analysis of the constitutional issue.

FACTS AND PROCEDURAL HISTORY

This case concerns the SBT imposed on plaintiff for the fiscal years ending October 31, 1989, through October 31, 1994. Plaintiff is a multinational engineering, construction, and technical service company having its principal place of business in Irvine, California. At issue are services plaintiff undertook for Michigan construction projects.[1] Plaintiff performed construction management and material procurement activities in Michigan for these projects. It also conducted engineering and architectural services for the projects at facilities outside Michigan.

Plaintiff timely filed its SBT annual returns for the years in issue. However, it did not attribute to Michigan, as Michigan sales, the receipts for engineering and architectural services that occurred outside the state but were performed for Michigan projects. Following an audit, defendant issued plaintiff three bills, called "intents to assess," for taxes due for the years in issue. The intents to assess were based on defendant's position that the receipts for the engineering and architectural services should have been reported as having come from Michigan sales.

---

[1] The Michigan projects for which plaintiff performed services include the cogeneration plant in Midland, a refinery modification for Marathon Oil Company in Detroit, and a steam building expansion for what was then the Upjohn Company in Kalamazoo.

Plaintiff requested and was granted a departmental informal conference on its objections to the intents to assess. Following the informal conference, the hearing referee recommended that all three bills be canceled in their entirety. The referee determined that the receipts should not be considered as coming from Michigan sales for SBT apportionment purposes. The Commissioner of Revenue disagreed with the referee's recommendation and ordered the intents to assess made final as originally prepared. The commissioner affirmed the assessment in conformity with the department's long-held interpretation of § 53 of the SBTA.

Plaintiff paid the taxes under protest and filed an appeal in the Court of Claims. When the parties filed cross-motions for summary disposition, the Court of Claims denied the defendant's motion and granted plaintiff's. The court adopted plaintiff's construction of § 53 of the SBTA that limited Michigan sales to services performed in Michigan for construction projects in Michigan.

Defendant appealed as of right in the Court of Appeals, which reversed the judgment of the Court of Claims in a published opinion. It held that the Court of Claims incorrectly determined that § 53 of the SBTA limits Michigan sales to services performed in Michigan, but that the statute was unconstitutional. The Court of Appeals decided that the tax violated the Commerce Clause because it was not fairly apportioned. After holding that summary disposition had been erroneously granted, the Court of Appeals remanded for reconsideration of the tax calculations.

Defendant applied for leave to appeal in this Court, seeking to reverse the ruling of unconstitutionality. Plaintiff applied for leave to cross-appeal, seeking to reinstate the Court of Claims statutory interpretation. This Court granted both parties' applications. 474 Mich 1097 (2006).

STANDARD OF REVIEW

An interpretation of a statute is a question of law that this Court reviews de novo. *Lincoln v Gen Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000). Constitutional questions are also reviewed de novo. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006). Likewise, this Court reviews de novo a trial court's decision on a motion for summary disposition. *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d 589 (2006).

When interpreting a statute, this Court must give effect to the intent of the Legislature. *Ford Motor Co v Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). At times, it is possible to discern that intent from the language used. *Id.* However, where a statute is ambiguous, it is necessary to engage in judicial construction to ascertain intent. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). A statute is ambiguous when there can be reasonable disagreement over its meaning. *People v Adair*, 452 Mich 473, 479; 550 NW2d 505 (1996).

THE SINGLE BUSINESS TAX ACT

The SBT is a value-added tax imposed on any person undertaking business activity in the state of Michigan. MCL 208.31. This includes companies that do all their

business in Michigan as well as companies, like plaintiff, whose business activity is predominantly outside Michigan. A value-added tax measures a firm's total business activity. *Trinova Corp v Michigan Dep't of Treasury*, 498 US 358, 364; 111 S Ct 818, 112 L Ed 2d 884 (1991). "The tax is on what a business has added to the Michigan economy, not on what the business has derived from this state's economy." *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 666-667; 649 NW2d 760 (2002).

In order to determine the proper SBT for a multistate taxpayer, the tax base must be apportioned to Michigan. MCL 208.41. The formula used for apportioning the tax base consists of the sum of the sales factor, the payroll factor, and the property factor, divided by three.[2] At issue in this case is the calculation of plaintiff's sales factor. "The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax

---

[2] The apportionment factor for the tax years beginning before January 1991 was the average of three factors each weighted at 33-1/3 percent. See *Corning, Inc v Dep't of Treasury*, 212 Mich App 1, 3; 537 NW2d 466 (1995). For the tax years beginning after December 31, 1990, and before January 1, 1993, the apportionment formula consisted of the sum of the following percentages:

(a) The property factor multiplied by 30%.

(b) The payroll factor multiplied by 30%.

(c) The sales factor multiplied by 40%. [MCL 208.45(2), as amended by 1991 PA 77, § 1.]

And for the years at issue beginning after December 31, 1992:

(a) The property factor multiplied by 25%.

(b) The payroll factor multiplied by 25%.

(c) The sales factor multiplied by 50%. [MCL 208.45(4), as amended by 1991 PA 77, § 1.]

year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year." MCL 208.51(1).

Section 52 of the SBTA, MCL 208.52, dictates when the sale of tangible personal property is in Michigan, while § 53 covers other sales, such as the sale of services. This case involves the application of § 53, which provides as follows:

> Sales, other than sales of tangible personal property, are in this state if:
>
> a) The business activity is performed in this state.
>
> (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.
>
> (c) Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts. [MCL 208.53.]

It is subsection c that controls the disposition of this case.

INTERPRETING THE STATUTE

The first task is to decide whether subsection c of MCL 208.53 allows defendant to characterize receipts from planning and design services rendered entirely outside Michigan as Michigan sales. Four separate entities have interpreted this provision in the course of these proceedings.

The hearing referee and the Court of Claims adopted the interpretation advocated by plaintiff and found that § 53(c) does not allow defendant to characterize the out-of-state services as Michigan sales. The Commissioner of Revenue and the Court of Appeals agreed with defendant's interpretation and determined that § 53(c) does allow defendant to characterize the out-of-state services performed for Michigan construction projects as Michigan sales. The nonuniformity of these conclusions signals that the correct construction of this statute is not obvious.[3]

When the correct construction of a statute is unclear and reasonable minds differ about its interpretation, it is necessary to engage in judicial construction to ascertain the Legislature's intent.[4] *In re MCI*, 460 Mich at 411. In

---

[3] The drafting of this statute is awkward and renders the meaning of subsection c less clear than it might be if it stood alone. The statute's parallel structure is flawed. Subsection c was grafted onto a standard provision from the Uniform Division of Income for Tax Purposes Act, § 1 *et seq.* (UDITPA). 7A, part I, ULA, p 141. However, its wording does not conform to the structure of the UDITPA provision. The introduction to all three subsections is a conditional definition of sales receipts as Michigan receipts, using the word "if." The wording of subsections a and b naturally completes the conditional phrase. However, subsection c does not.

[4] The majority proceeds as if the statutory provision is unambiguous and needs no interpretation. It is a bizarre notion that the language of a statute can have only one reasonable meaning when four separate independent entities have split on its correct interpretation.

The majority claims that my definition of ambiguity is inconsistent with current law. The majority is within its rights to disagree with the definition I use for that word. But it is off base in suggesting that its definition of "ambiguity" is the current law of the state. It appears that the majority believes that only the definition of "ambiguity" that it favors may be used for statutory interpretation. I know of no legal authority that supports that position. The majority appears to confuse the binding effect of a legal holding necessary for the determination of a case with the nonbinding effect of the statutory analysis used to reach

(Continued on following page)

construing a statutory provision, courts must reconcile the provision with other provisions of the statute, if possible. And one part of a statute should not be construed so as to render another part nugatory or ineffective. See, e.g., *Altman v Meridian*, 439 Mich 623, 635; 487 NW2d 155 (1992); *Farrington v Total Petroleum, Inc*, 442 Mich 201, 209; 501 NW2d 76 (1993).

According to plaintiff, receipts derived from planning activities, design activities, or construction activities are deemed Michigan sales only if the activities occur in this state. This interpretation must be rejected. Subsection a expressly addresses services performed in Michigan. If § 53(c) were to be interpreted to mean that the services had to be performed in Michigan in order to be considered Michigan sales, then subsection c would be reduced to a redundancy.

By finding that services performed for construction projects located in Michigan are Michigan sales, each provision of the statute is given effect. When the statute is interpreted in this fashion, § 53(a) provides that when the business activity is in Michigan, the sales of other than tangible personal property are Michigan sales. Section 53(b) covers the situation where business activities are both in Michigan and outside Michigan. If a greater proportion of the business activity is in Michigan, then the

---

it. The justices who comprise the majority are entitled to favor one form of analysis or one definition of a word used in analysis over another. But they cannot mandate that all other justices use only their chosen approach or definitions for these words. "Ambiguous" is one such word. Differing modes of analysis and definitions may be considered disfavored in the sense that the majority prefers others. But, the minority's definitions, when acceptable in current dictionaries, cannot be banned.

sales of other than tangible personal property are characterized as Michigan sales. Section 53(c) addresses the situation where services are performed for planning, design, or construction projects in Michigan.

Another consideration that weighs in my determination is that a construction that nullifies the effectiveness of a statute should be avoided if possible. *In re Petition of State Hwy Comm*, 383 Mich 709, 714-15; 178 NW2d 923 (1970). Rather, when engaging in judicial construction, a court must bear in mind the purpose of the statute. "When faced with two alternative reasonable interpretations . . . , we should give effect to the interpretation that more faithfully advances the legislative purpose behind the statute." *Adair*, 452 Mich at 479-480.

Apparently, the Legislature added subsection c in response to a concern advanced by Michigan-based engineering and architectural firms that, without it, they would be at a competitive disadvantage with out-of-state firms. They feared that out-of-state architects and engineers would gain a competitive advantage when bidding on Michigan construction projects if their services for in-state projects were not treated as Michigan sales.[5] The interpretation advocated by defendant addresses the concerns that appear to have prompted the enactment of this statute.

---

[5] A July 17, 1975, letter from the Consulting Engineers Council of Michigan, Inc., to Senator John Bowman proposed the addition of § 53(c). The letter and circumstances surrounding the adoption of the subsection demonstrate the intent in enacting it. It was enacted so that all the services performed for construction projects would be attributed to the state where the services are consumed.

Finally, we defer to the construction given a statute by the agency chosen to enforce it. *Breuhan v Plymouth-Canton Community Schools*, 425 Mich 278, 283; 389 NW2d 85 (1986). Defendant has historically interpreted § 53(c) as ascribing services performed for construction projects to the state in which the construction occurs.[6] I give weight to this interpretation.

ANALYZING THE COMMERCE CLAUSE

The decision that the statute allows the revenues at issue to be taxed is not the end of the inquiry. It is also necessary to decide whether the tax violates the Commerce Clause of the United State Constitution.[7]

The Commerce Clause provides that "Congress shall have Power . . . [t]o Regulate Commerce . . . among the several States. . . ." US Const, art I, § 8, cls 1 and 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc v Oregon Dep't of Environmental Quality*, 511 US 93, 98; 114 S Ct 1345; 128 L Ed 2d 13 (1994).

The United States Supreme Court has held that a state tax will survive a Commerce Clause challenge when

---

[6] Defendant instructs its audit staff that services related to Michigan construction activities are by statute Michigan receipts. Defendant does not attribute to Michigan similar receipts received by a Michigan-based company for construction activities in other states.

[7] I cannot join the majority's constitutional analysis because I find it to be incomplete and conclusory.

the tax (1) is applied to an activity having a substantial nexus to the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977). Plaintiff claims that the tax at issue violates the first two prongs of this test.[8]

Several principles should be kept in mind when analyzing the constitutionality of a tax. States have great latitude when enacting tax provisions. See *Trinova Corp.*, 498 US at 386. Also, a statute is presumed constitutional absent a clear showing to the contrary. *Lehnhausen v Lake Shore Auto Parts Co*, 410 US 356, 364; 93 S Ct 1001, 35 L Ed 2d 351 (1973). This presumption of constitutionality is especially strong with respect to taxing statutes. *Washtenaw Co v State Tax Comm*, 422 Mich 346, 371; 373 NW2d 697 (1985), citing *Thoman v City of Lansing*, 315 Mich 566, 576; 24 NW2d 213 (1946).

Plaintiff argues that the construction defendant gives to this statutory provision permits the imposition of a tax on activities that do not have a substantial nexus with Michigan. It claims that no substantial nexus exists in this case because plaintiff's activities occurred outside Michigan, and a state cannot tax activities that occur outside that state. I find that plaintiff misconstrues the connection necessary for a state to have a substantial nexus with the taxpayer and the activity being taxed.

---

[8] Plaintiff also claims that the tax discriminates against interstate commerce because the tax is not fairly apportioned. Because this argument is based on the tax violating fair apportionment, plaintiff really argues only that the tax violates the first two prongs of the test.

"[I]n the case of a tax on an activity, there must be a connection to the activity itself, [and] a connection . . . to the actor the State seeks to tax. . . ." *Allied-Signal, Inc v Director, Div of Taxation*, 504 US 768, 778; 112 S Ct 2251; 119 L Ed 2d 533 (1992). Accordingly, two different inquiries may arise in determining whether the substantial nexus prong is satisfied. *Id.* First, the state must have the authority to tax. *Id.* For this authority to exist the taxpayer must have a physical presence in the taxing jurisdiction. See *Quill Corp v North Dakota*, 504 US 298, 311, 112 S Ct 1904, 119 L Ed 2d 91 (1992). Second, the state must not exceed its legitimate power to tax. *Allied-Signal, Inc*, 504 US at 778. "[T]he State's power to tax an individual's or corporation's activities is justified by the 'protection, opportunities and benefits' the State confers on those activities." *Id.*, quoting *Wisconsin v J C Penney Co*, 311 US 435, 444; 61 S Ct 246; 85 L Ed 267 (1940).

In this case, the parties stipulated that plaintiff performed construction management and material procurement activities in Michigan. On the basis of this presence, the state clearly has the power to tax plaintiff. The question becomes whether the state exceeded the legitimate reach of its power.

A taxpayer arguing that a tax lacks a substantial nexus to the activity taxed cannot rely on the argument that the source of the income is attributable to another state. *Mobil Oil Corp v Vermont Comm'r of Taxes*, 445 US 425, 438; 100 S Ct 1223, 63 L Ed 2d 510 (1980). Rather, to mount a successful challenge on this ground, the taxpayer must show that the income taxed was "earned in the course of activities unrelated to [the taxing] State." *Id.* at 439.

Plaintiff cannot make this showing. Because the receipts at issue arose from services that plaintiff provided for Michigan construction projects, there is a substantial nexus between the state and the activity being taxed. As long as plaintiff has some physical presence in the state, the state may tax services that plaintiff performs out of state but that are generally consumed within Michigan. See *Trinova Corp.*, 498 US at 374-377.

Plaintiff also claims that the interpretation advocated by defendant violates the Commerce Clause requirement of fair apportionment. According to plaintiff, the tax is not internally consistent. It reasons that, under this interpretation, every state with a similar statute could tax all of a business's receipts for planning and design activities. The result would be duplicative taxation, unconstitutionally putting interstate commerce at a competitive disadvantage.

In 1992, this Court ruled that "[f]air apportionment requires that each state tax only its fair share of interstate business activity." *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 417; 488 NW2d 182 (1992). Before that, the United States Supreme Court ruled that, to ascertain whether a tax is fairly apportioned, it must be examined for both internal and external consistency. *Goldberg v Sweet*, 488 US 252, 261-262; 109 S Ct 582, 102 L Ed 2d 607 (1989). Plaintiff does not challenge the external consistency of the tax; therefore, in deciding whether this tax is fairly apportioned, it is examined for internal consistency only.

The United States Supreme Court discussed internal consistency in *Oklahoma Tax Comm v Jefferson Lines, Inc*, 514 US 175; 115 S Ct 1331, 131 L Ed 2d 261 (1995). It stated:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax. [*Id.* at 185.]

Applying these principles to MCL 208.53, I conclude that the tax is internally consistent. Subsection c of the statute specifically deals with construction projects. When a construction project is involved, subsection c, being the more specific provision, applies and subsections a and b do not. Subsection c ascribes the business activity[9] for construction projects to the state where the construction occurs. Therefore, when a construction project is involved, only the state where the construction occurs taxes the business activity, and there is no double taxation.

An example is helpful to illustrate why there is no internal-consistency problem. Consider the situation

---

[9] When I speak of business activity, I refer not just to the physical labor that goes into building the project but also to the planning and design that take place beforehand.

where a company performed services both in Michigan and Ohio for a construction project in Michigan. If Ohio adopted the same tax apportionment formula as Michigan, both states would ascribe all the business activity to the state where the construction occurs. Because the construction occurred in Michigan, only Michigan would tax the services. As a result, only one state would tax the business activity and there would be no internal-consistency problem.[10]

CONCLUSION

MCL 208.53(c) allows defendant to characterize receipts from services performed for construction projects in Michigan as Michigan sales. Accordingly, defendant properly assessed taxes on the revenue for the engineering and design services plaintiff provided for construction projects in Michigan, regardless of which services occurred outside Michigan. Because a substantial nexus exists between Michigan and the activity of plaintiff that is being taxed, and because the tax is fairly apportioned, the tax is constitutional. As a result, I concur in affirming in part

---

[10] The Court of Appeals applied the internal-consistency test as if other states that adopted the same statute would ascribe construction activities under subsections a or b. This was error. When a construction project is involved, Michigan ascribes all business activity to the state where construction occurs. Therefore, for purposes of the test, other states that adopt the same statute would also ascribe all business activity to the state where construction occurs. Subsections a and b would be inapplicable. Admittedly, it is possible that another state could enact a statute that would allow for double taxation, which seems to be what the Court of Appeals was concerned about. However, the internal-consistency test does not say a taxpayer shall never be subject to double taxation. It says that, if every state emulates the state tax at issue, a taxpayer shall not be subject to double taxation.

and reversing in part the judgment of the Court of Appeals.

Marilyn Kelly
Michael F. Cavanagh
Elizabeth A. Weaver

Court of Appeals, State of Michigan

ORDER

Fluor Enterprises Inc v Dept of Treasury

Docket No. 251005

LC No. 02-000027-MT

Mark J. Cavanagh
Presiding Judge

Kathleen Jansen

Hilda R. Gage
Judges

The Court orders that the appellant's motion for reconsideration is DENIED.

The Court orders that the appellee's motion for reconsideration is DENIED.

/s/ Mark Cavanagh

[SEAL] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 10 2005
Date

/s/ Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

FLUOR ENTERPRISES, INC., Plaintiff-Appellee,	FOR PUBLICATION April 14, 2005 9:10 a.m.
v	No. 251005
DEPARTMENT OF TREASURY, Defendant-Appellant.	Court of Claims LC No. 02-000027-MT
	Official Reported Version

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiff, a California corporation that engages in engineering, construction, and technical services, performed architectural and engineering services at its out-of-state offices for projects located in Michigan during the tax years 1989 to 1994.[1] The Court of Claims held that receipts from the services performed outside Michigan for projects constructed in Michigan were not "in this state" for the purpose of calculating the sales factor to be used in apportioning plaintiff's tax base under the Single Business Tax Act (SBTA), MCL 208.1 *et seq.*[2] Defendant appeals as of right the September 2, 2003, judgment of the Court of Claims, arguing that the court incorrectly interpreted MCL 208.53(c). We agree with defendant's interpretation of the

[1] Plaintiff also engaged in construction management and material procurement in Michigan, but receipts for these activities are not at issue in this case.

[2] We note that for tax years beginning after December 31, 2009, the SBTA has been repealed.

provision, but conclude that the provision violates the Commerce Clause, US Const, art I, § 8, cl 3.

I. Factual background and procedure

The facts in this case are undisputed. The receipts at issue were received by plaintiff for engineering and architectural services related to real estate improvement projects constructed in Michigan. The services were performed by plaintiff's employees at out-of-state facilities. Plaintiff timely filed single business tax (SBT) returns for the years at issue. However, plaintiff did not report the receipts at issue as Michigan receipts. Following an audit, defendant issued three bills for taxes due (intents to assess) totaling $182,312.

Plaintiff requested an informal conference with defendant's Hearings Division. Following an informal conference, the department referee issued a recommendation to the Commissioner of Revenue. The hearing referee agreed with plaintiff's interpretation of § 53(c). However, the Commissioner of Revenue disagreed with the referee's analysis and directed that the taxes be assessed as originally determined. Following the commissioner's order, defendant issued three bills for taxes due (final assessments) for total tax and interest of $343,340.96, which plaintiff then paid under protest. Plaintiff subsequently paid an additional $3,077.35 in interest.

Plaintiff filed this action in the Court of Claims to recover $346,618.31 paid under protest plus additional statutory interest, costs, and attorney fees. The parties both filed motions for summary disposition. Plaintiff moved for summary disposition pursuant to MCR 2.116(A) (judgment on stipulated facts). Defendant moved for

summary disposition pursuant to MCR 2.116(C)(8) and (10). The Court of Claims concluded that the plain language of the statute supported plaintiff's position and entered judgment in favor of plaintiff, ordering defendant to pay $346,418.31 and interest.

II. Overview of the SBTA

The SBT is a form of value added tax. *Trinova Corp v Dep't of Treasury,* 433 Mich 141, 149; 445 NW2d 428 (1989), aff'd and rem *Trinova Corp v Michigan Dep't of Treasury,* 498 US 358; 111 S Ct 818, 112 L Ed 2d 884 (1991).

> "Value added is defined as the increase in the value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale." [Haughey, *The economic logic of the single business tax,* 22 Wayne L R 1018 n 6 (1976).] In short, a value added tax is a tax upon business activity. The [SBTA] employs a value added measure of business activity. . . . It is not a tax on income. [*Trinova,* 433 Mich at 149; 445 NW2d 428.]

The Michigan Supreme Court's decision in *Mobil Oil Corp v Dep't of Treasury,* 422 Mich 473; 373 NW2d 730 (1985), includes an extensive discussion of value-added taxes and a comparison with income taxes. The Court explained:

> Both income taxes and value-added taxes are taxes on the economic process; the difference between them lies in what point of the process they attach to or, to put it another way, in what elements of the economic process they tax. The income tax taxes what has been received from the economy, when it becomes "income." The VAT

[value added tax] taxes economic activity itself and can be described in two ways: as a tax on the economic actor's use of the scarce resources of society, or as a tax on the value the economic actor adds to the economy. In the end, the income tax and the VAT tax the same things, but at different stages of the economic process, and thus generate the same amount of revenue and affect the economy identically.

The economic process consists of the use of various inputs in order to produce final goods. These inputs include: raw materials or land, intermediate goods, labor, capital, and profits. The value added to the economy by the production of final goods is the sum total of all the inputs into their production. Haughey, *The economic logic of the single business tax,* 22 Wayne L R 1017, 1018-1020 (1976). The value added by the production of a final good is the sum of the value of the raw materials, intermediate goods, labor, capital, and the profit which were combined in order to produce that final good. The value-added tax is imposed on the value added by the production of the final good or, to say the same thing in another way, upon the use of all these inputs in adding value to the economy.

The value of the inputs used is measured by the cost to the producer of obtaining the use of those inputs. The value of the worker's labor is the wages the laborer is paid to produce the good. The value of the raw materials, intermediate goods, and capital is what the producer must pay in order to obtain the use of these things. And the profit is what keeps the producer-entrepreneur in business, which is measured by the difference between the cost of production and the receipts from sales.

> It is apparent that the income tax and the VAT are in reality opposite sides of the same coin. The value of the labor used in production, and the cost to the producer of obtaining the labor, is the wages paid to the laborer, and the income the worker receives for providing labor to the economy. The value of the capital and intermediate goods used is what the producer must pay to obtain them, and that is equivalent to the receipts of their suppliers for providing the labor, entrepreneurial effort, and capital with which to produce them. The profit which keeps the producer in the business of producing is the income received for doing so.
>
> Both the income tax and the VAT tax the value of the inputs used in the economic process as measured by the value, or price, ascribed to that input by the economy. The basic difference is that the VAT taxes the price paid for the input and the income tax taxes the price received for the input. The VAT taxes the use of the resources of society; the income tax taxes the return received for supplying those resources to the economy. [*Mobil Oil,* 422 Mich at 492-495.]

The SBTA "'measures the increase in value of goods and services brought about by whatever a business does to them between the time of purchase and time of sale.' The tax is on what a business has added to the Michigan economy, not on what the business has derived from this state's economy." *Columbia Assoc, LP v Dep't of Treasury,* 250 Mich App 656, 666-667; 649 NW2d 760 (2002), quoting *Guardian Photo, Inc v Dep't of Treasury,* 243 Mich App 270, 277; 621 NW2d 233 (2000).

The first step in computing the tax is the calculation of the taxpayer's tax base. See *Trinova,* 433 Mich at 150,

and *Mobil Oil,* 422 Mich at 495-497, which discuss the methods of calculating the tax base. Plaintiff's tax base is not at issue here.

The dispute in the present case concerns the second step of computing the tax, that is allocation or apportionment. "Once the taxpayer's tax base is determined, it must then be allocated to the state where the business activity of the taxpayer can be fairly attributed.' As a general principle, a State may not tax value earned outside its borders.'" *Trinova,* 433 Mich at 151, quoting *ASARCO, Inc v Idaho State Tax Comm,* 458 US 307, 315; 102 S Ct 3103; 73 L Ed 2d 787 (1982). Where a "taxpayer's business activity was only partially attributable to Michigan, only a portion of that activity may constitutionally be taxed. Consequently, the act provides a formula for apportioning a taxpayer's tax base between two or more taxing states." *Trinova,* 433 Mich at 151. Apportionment is permissible because precise geographic measurement of value added is not feasible. *Trinova,* 498 US at 374-377.

The SBTA apportionment formula is derived from a calculation involving three ratios, which are referred to as the property factor, the payroll factor, and the sales factor. MCL 208.45, 208.45a.[3] The formula determines an

---

[3] For tax years beginning before January 1991, the apportionment factor was the average of three ratios each weighted 33-⅓ percent. MCL 208.45(1). See *Corning, Inc v Dep't of Treasury,* 212 Mich App 1, 3; 537 NW2d 466 (1995). In 1991, the Legislature changed the formula to give more weight to the sales factor. At present, the three factors are each multiplied by a separately stated percentage (e.g., property factor is multiplied by five percent, payroll factor is multiplied by five percent, sales factor is multiplied by ninety percent) and then the results are added together to determine the apportionment factor. MCL 208.45(2)-(7); MCL 208.45a.

apportionment factor (a percentage under the current version), which is multiplied by the total tax base; this result, statutorily subject to other adjustments not pertinent in this case, is the taxpayer's "adjusted tax base." *Trinova,* 433 Mich at 152-153. The adjusted tax base is used to calculate the SBT liability pursuant to MCL 208.31. *Trinova,* 433 Mich at 153.

The sales factor is the subject of the present dispute. The term "sales" is defined in MCL 208.7 and includes "the performance of services." MCL 208.7(1)(a)(ii). The sales factor is defined in MCL 208.51 as a fraction with the numerator being the "the total sales of the taxpayer in this state during the tax year," and the denominator being "the total sales of the taxpayer everywhere during the tax year." MCL 208.52 sets forth specific circumstances when "[s]ales of tangible personal property are in this state." MCL 208.53 addresses sales "other than sales of tangible personal property[.]"

Sales, other than sales of tangible personal property, are in this state if:

> (a) The business activity is performed in this state.
>
> (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.
>
> (c) Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts.

The parties dispute the meaning of subsection c.

III. Interpretation of MCL 208.53(c)

Essentially, plaintiff offers two grammatical analyses to support its view. Plaintiff contends that the subsection "can only be read to refer to planning activities within this state, design activities within this state, or construction activities within this state," and the receipts at issue were derived from planning and design activities that occurred outside the state. In other words, "planning, design, or construction" and "within this state" modify "activities." Plaintiff also argues that the statute "can only be reasonably read to refer to 'services performed . . . within this state.'" In other words, "within this state" modifies "performed." The administrative hearing referee essentially agreed with plaintiff.

In contrast, defendant argues that the statute in effect states that "receipts derived from services performed out-of-state for planning, design, or construction/business activities performed in the state are treated as if Michigan receipts." According to defendant, subsection c applies to the challenged receipts for plaintiff's services because they were "derived from services performed for . . . construction activities within this state. . . ." The Commissioner of Revenue agreed with defendant's analysis.

The Court of Claims concluded that the plain language of the statute supported plaintiff's position.

> [U]pon a plain reading of subsection (c) of MCL 208.53, one comes away with the impression that receipts from services performed within this state for construction projects in Michigan are deemed to be Michigan receipts.
>
> In order to adopt the interpretation advocated by the Department in this matter, one

> would have to literally rewrite the statute, as Plaintiff has alleged, to read: Receipts derived from planning, design, and construction activities for construction projects located within this state shall be deemed Michigan receipts.
>
> It defies logic that, if this was truly what the legislature would have intended, that [sic] they would have enacted section 53(c) in its present form.

This Court reviews de novo a decision by the Court of Claims on a motion for summary disposition and issues requiring statutory interpretation. *Herald Wholesale, Inc v Dep't of Treasury,* 262 Mich App 688, 693; 687 NW2d 172 (2004).

The primary objective of judicial interpretation of statutes is to determine and give effect to the intent of the Legislature. Courts must initially examine the text of the statute. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999).

> "The words of a statute provide 'the most reliable evidence of [the Legislature's] intent. . . .'" *Sun Valley Foods Co v Ward,* 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette,* 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). In discerning legislative intent, a court must "give effect to every word, phrase, and clause in a statute. . . ." *State Farm Fire & Cas Co v Old Republic Ins Co,* 466 Mich 142, 146; 644 NW2d 715 (2002). The Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sun Valley, supra* at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501, 133 L Ed 2d 472

> (1995). "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley, supra* at 237. "If the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id.* at 236. [*Shinholster v Annapolis Hosp,* 471 Mich 540, 549; 685 NW2d 275 (2004).]

According to *Mayor of Lansing v Pub Service Comm,* 470 Mich 154, 165-166; 680 NW2d 840 (2004), the test for determining when a statute is ambiguous is *not* whether reasonable minds can differ concerning the meaning of the statute:

> The dissent would hasten findings of "ambiguity" by courts by predicating these findings on the basis of whether "reasonable minds can differ regarding" the meaning of a statute. *Post* at 174. Especially in the context of the types of cases and controversies considered by this Court – those in which the parties have been the most determined and persistent, the most persuaded by the merits of their own respective arguments – it is extraordinarily difficult to conclude that reasonable minds cannot differ on the correct outcome. That is not, and has never been, the standard either for resolving cases or for ascertaining the existence of an ambiguity in the law. The law is not ambiguous whenever a dissenting (and presumably reasonable) justice would interpret such law in a manner contrary to a majority. Where a majority finds the law to mean one thing and a dissenter finds it to mean another, neither may have concluded that the law is "ambiguous," and their disagreement by itself does not transform that which is unambiguous into that which is ambiguous. Rather, a provision of the law is

> ambiguous only if it "irreconcilably conflict[s]" with another provision, [*Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467, 663 NW2d 447 (2003)], or when it is *equally* susceptible to more than a single meaning. [Emphasis in original.]

Under this "traditional approach . . . only a few provisions are truly ambiguous. . . ." *Mayor of Lansing*, 470 Mich at 166.

Grammatically, the phrase "within this state" modifies "activities," which is the last antecedent. "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *In re Certified Question (Kenneth Henes Special Projects v Continental Biomass)*, 468 Mich 109, 113; 659 NW2d 597 (2003). "It is a general rule of statutory, as well as grammatical, construction that a modifying clause is confined to the last antecedent, unless there is something in the subject matter or dominant purpose which requires a different interpretation." *Winokur v State Bd of Dentistry,* 366 Mich 261, 266; 114 NW2d 233 (1962); *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002); 2A Singer, Sutherland Statutory Construction (6th ed), § 47:26, pp 333-334; § 47:33, 369-371. "The last antecedent is 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.'" *Id.* at § 47:33, pp 369-371 (citation deleted). In MCL 208.53(c), the last antecedent for the phrase "within this state" is "activities."

Thus, the language at issue, examined in its grammatical context, supports defendant's position. The challenged receipts are "derived from services performed for planning, design, or construction activities within this state" and

therefore "shall be deemed Michigan receipts." MCL 208.53(c). Plaintiff essentially advocates an interpretation that "within this state" modifies "performed," which is not the last antecedent for the phrase. If the Legislature intended that meaning, the section would have been written, "Receipts derived from services performed within this state for planning, design, or construction activities shall be deemed Michigan receipts."

Plaintiff notes that § 53(c) is prefaced with the word "if," and argues that it is therefore not a directive, but a condition. According to plaintiff, "As written, and in accordance with standard rules of grammatical construction, § 53(c) *presents only a necessary condition* that must be satisfied in order for a sale to be a Michigan sale. Section 53(c) does not direct that certain receipts be considered Michigan sales, but only that some other provision may specify the circumstances under which those receipts are 'deemed' Michigan sales."

Although the structure of § 53 indicates that subsection c as well as subsections a and b are prefaced with "if," that conditional construction of subsection c is problematic. The difficulty is demonstrated by reversing the order of the clauses: If certain receipts (those derived from services performed for planning, design, or construction activities within this state) "shall be deemed Michigan receipts," then sales, other than sales of tangible personal property, are in this state. The conditional "if" conflicts with the mandatory "shall." It is unclear who or by what authority receipts "shall be deemed Michigan receipts." If that purported condition were somehow satisfied, the statute would apparently indicate that all sales, with the exception of sales of tangible personal property, are "in this state." Although "if" seems to correctly preface

subsections a and b, we are not persuaded that subsection c is conditional, as argued by plaintiff.

In summary, § 53(c) is not ambiguous, i.e., it does not irreconcilably conflict with another provision and is not equally susceptible to more than a single meaning. *Mayor of Lansing*, 470 Mich at 165-166. Rather, in its grammatical context, the last antecedent for "within this state" is "activities." Accordingly, receipts derived from services performed for construction activities within this state shall be deemed Michigan receipts for the purpose of the sales factor. The parties agreed that the challenged receipts were for services "that related to real estate improvement projects constructed in Michigan." Thus, these receipts were derived from services performed for construction activities within this state. The Court of Claims incorrectly interpreted the statute.

IV. Commerce Clause analysis

Defendant contends that its interpretation of § 53(c) does not violate the Commerce Clause, as was alleged in plaintiff's complaint. Although the constitutionality of § 53(c) as interpreted by defendant was addressed by the parties in their briefs in support of, and in response to, the motions for summary disposition, the Court of Claims accepted plaintiff's interpretation of § 53(c) and did not decide the issue whether defendant's interpretation of § 53(c) would violate the Commerce Clause. This Court may address an issue not decided by the trial court where the Court may decide the issue as a matter of law and the facts necessary for resolution have been presented. *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 516; 686 NW2d 506 (2004).

The general principles that apply when considering a constitutional challenge to a taxing statute are set forth in *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 413-415; 488 NW2d 182 (1992). See also *Jefferson Smurfit Corp v Dep't of Treasury*, 248 Mich App 271, 277-278; 639 NW2d 269 (2001). "The presumption of constitutionality is especially strong with respect to taxing statutes. . . . A taxing statute must be shown to clearly and palpably violate the fundamental law before it will be declared unconstitutional." *Id.* at 277 (citations, internal quotation marks, and brackets omitted).

The constitutional challenge at issue concerns the Commerce Clause, US Const, art I, § 8, cl 3, which expressly grants Congress the power to "regulate Commerce . . . among the several States" and contains "a further, negative command, known as the dormant Commerce Clause [doctrine], prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm v Jefferson Lines, Inc*, 514 US 175, 179; 115 S Ct 1331; 131 L Ed 2d 261 (1995).

A state tax is constitutionally valid under the Commerce Clause "provided that the tax: (1) is applied to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state." *Caterpillar*, 440 Mich at 415, citing *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977). In this case, the parties' arguments are primarily directed at the first and second prongs.

A. Substantial nexus

Defendant asserts that the substantial nexus prong is satisfied under its interpretation of the statute because the tax is being applied to projects in Michigan. Plaintiff asserts that this argument "is contrary to the Stipulation of Facts, which unambiguously states that receipts at issue are *not* for construction, but rather are for engineering and architectural services rendered outside Michigan." Citing *Allied-Signal, Inc v Director, Div of Taxation*, 504 US 768; 112 S Ct 2251; 119 L Ed 2d 533 (1992), plaintiff contends that to satisfy the Due Process Clause and the Commerce Clause, a state must have a connection not only to the taxpayer but also to the specific activities it seeks to tax.

However, analysis of the substantial nexus prong does not depend on whether the particular activity may be geographically assigned to Michigan, as the parties' arguments imply.

In *Allied-Signal,* 504 US at 778, the Court reiterated "the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax," and explained that there are two different inquiries that may arise in the context of a challenge to the nexus. "The constitutional question in a case such as *Quill Corp* [*v North Dakota*, 504 US 298, 315; 112 S Ct 1904; 119 L Ed 2d 91 (1992)] is whether the State has the authority to tax the corporation at all." *Allied-Signal*, 504 US at 778. The *Quill* Court held that the Commerce Clause required a taxpayer's physical presence in the taxing jurisdiction. See *Barclays Bank PLC v Franchise Tax Bd of California*, 512 US 298, 312 n 10; 114 S Ct 2268; 129 L Ed 2d 244

(1994); *Rayovac Corp v Dep't of Treasury*, 264 Mich App 441, 444-448; 691 NW2d 57 (2004). The Court in *Allied-Signal* distinguished the issue there from that in *Quill*: "The present inquiry, by contrast, focuses on the guidelines necessary to circumscribe the reach of the State's legitimate power to tax." *Allied-Signal*, 504 US at 778. In this case, as in *Barclays Bank PLC*, there is no dispute whether plaintiff had a physical presence in Michigan and that Michigan had the authority to tax plaintiff. Rather, plaintiff's challenge in the present case concerns whether the state exceeded the reach of its legitimate power to tax.

With respect to the allocation of income, the requisite connection between a taxing state and the business activity does not depend on geographical accounting of the particular income – producing business activity. Because of complications and uncertainties in allocating income of multistate businesses, states are permitted to tax those businesses "on an apportionable share of the multistate business carried on in part in the taxing State. That is the unitary business principle." *Allied-Signal*, 504 US at 778. A taxpayer wanting to exclude income from the general principle of apportionability because it lacks a satisfactory nexus with the taxpayer's in-state activities may not rely on the argument that the source of the income is geographically attributable to another state "so long as the intrastate and extrastate activities formed part of a single unitary business." *Mobil Oil Corp v Vermont Comm'r of Taxes*, 445 US 425, 438; 100 S Ct 1223; 63 L Ed 2d 510 (1980). Rather, the taxpayer must show that "'income was earned in the course of activities unrelated to [those carried out in the taxing] State.'" *Allied-Signal*, 504 US at 787, quoting *Exxon Corp v Wisconsin Dep't of Revenue*, 447 US 207, 223; 100 S Ct 2109; 65 L Ed 2d 66 (1980), quoting

Mobil Oil Corp, 445 US at 439. Thus, with respect to apportionment of income, a taxpayer mounting an attack on the connection between an activity and the taxing state must frame the attack in terms of that standard, not whether the particular activity may be allocated to the state on a geographical basis.

We likewise conclude that, contrary to the assumptions in the parties' arguments, the connection between a taxing state and the activity does not depend on geographical accounting of the particular business activity. Although the decision in *Allied-Signal* concerned apportionment of income, rather than value added tax, the Court's decision in *Trinova* suggests that the same standard would apply with respect to apportionment under the SBTA. The United States Supreme Court upheld the use of the SBTA apportionment formula because it concluded that value added, like income, is not susceptible of precise geographic assignment. *Trinova*, 498 US at 374-380. The Court analogized the argument raised by the taxpayer in that case to arguments concerning allocation of income that the Court had previously rejected.

> As with a VAT [value added tax], the discrete components of a state income tax may appear in isolation susceptible of geographic designation. Nevertheless, since *Underwood Typewriter Co v Chamberlain*, 254 US 113; 41 S Ct 45; 65 L Ed 165 (1920), we have recognized the impracticability of assuming that all income can be assigned to a single source. In this respect, Trinova's argument becomes a familiar and often rejected genre of taxpayer challenge:
>
> "Apportionability often has been challenged by the contention that . . . the source of [particular] income may be ascertained by separate

> geographical accounting. The Court has rejected that contention so long as the intrastate and extrastate activities formed part of a single unitary business. . . ." [*Trinova*, 498 US at 377-378, quoting *Mobil Oil*, 445 US at 438.]

Thus, plaintiff's argument, that inclusion in the apportionment formula of receipts for services performed out of state necessarily violates the Commerce Clause because the business activity lacks a substantial nexus with the state, is essentially the same "familiar and often rejected genre of tax-payer challenge[.]" *Trinova*, 498 US 378.

B. "Fairly apportioned"

"Fair apportionment requires that each state tax only its fair share of interstate business activity." *Caterpillar*, 440 Mich at 417. A determination whether apportionment is fair in a given case involves two components. First, the tax structure must be internally consistent, which means, "'a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result[.]'" *Id.* at 419, quoting *Goldberg v Sweet*, 488 US 252, 261; 109 S Ct 582; 102 L Ed 2d 607 (1989). Second, the apportionment must be externally consistent, which "the choice of factors used in apportionment 'reasonably reflects the in-state component of the activity being [apportioned].'" *Caterpillar*, 440 Mich at 419, quoting *Goldberg*, 488 US at 262. Plaintiff does not challenge the external consistency component.

In *Oklahoma Tax Comm*, 514 US at 185, the Court explained the internal consistency component as follows:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

In the context of income apportionment, internal consistency requires that the formula "such that, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed." *Container Corp of America v Franchise Tax Bd*, 463 US 159, 169; 103 S Ct 2933; 77 L Ed 2d 545 (1983). Similarly, in the context of the SBT, the component requires that if every state were to impose an identical tax, "no more than one hundred percent of the taxpayer's business activity would be taxed." *Caterpillar*, 440 Mich at 419.

Section 53(c), as interpreted by defendant, fails the internal consistency test. If other states used the same apportionment formula, there are situations in which more than one state would tax business activity performed in one state for construction activities in another. This is demonstrated by consideration of a scenario in which a company performed services both in Michigan and out of state (for this example, Ohio) for construction activities in

Michigan. Under defendant's interpretation of § 53(c), the receipts derived from both the in-state and out-of-state services are deemed Michigan receipts. For the internal consistency analysis, one assumes that other jurisdictions are using the same apportionment formula. If Ohio had the same apportionment formula, its ability to tax the business activity in Michigan and Ohio would depend on § 53(b). If the greater proportion of the business activity as measured by cost of performance occurred in Ohio, then the sale is an Ohio sale and would be used in the Ohio sales factor. In this situation, the taxpayer's business activity (services performed in Ohio and Michigan) would be included in the sales factor of both jurisdictions' apportionment formula. As a result, the provision places interstate commerce at a competitive disadvantage with intrastate commerce. Thus § 53(c), as interpreted by defendant, fails the internal consistency component of the fair apportionment prong of the *Complete Auto* test and violates the Commerce Clause.

V. Conclusion

We hold that MCL 208.53(c) is unconstitutional because it violates the Commerce Clause. Because there was a question on this constitutional issue, summary disposition was erroneously granted.

We remand for reconsideration of tax calculations.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Hilda R. Gage

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

/

FLUOR ENTERPRISES, INC.,

Plaintiff,

v

File No. 02-27-MT
HON. PAULA J.M. MANDERFIELD

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant. /

PATRICK R. VAN TIFLIN (P26119)
DANIEL L. STANLEY (P57052)
Honigman Miller Schwartz and Cohn, LLP
Attorneys for Plaintiff
The Phoenix Building, Suite 400
222 North Washington Square
Lansing, Michigan 48933
517/377-0702

GLENN R. WHITE (P53520)
JUDITH I. BLINN (P26678)
Michigan Department of Attorney General
Attorney for Defendant
Revenue Division
First Floor, Treasury Building
Lansing, Michigan 48922
517/373-3203

/

JUDGMENT

(Filed Sept. 2, 2003)

At a session of said Court, held in the Circuit Courtrooms located in the City of Lansing, County of Ingham, State of Michigan, on the 2 day of ~~August~~ Sept 2003.

PRESENT: HONORABLE PAULA J.M. MANDERFIELD,
Court of Claims Judge Presiding

This matter having come before the Court on Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(A) and Defendant's Motion for Summary Disposition under MCR 2.116(C)(8) and (C)(10) and the Court having reviewed the Stipulation of Facts and Briefs filed by the parties, and having heard oral argument on August 27, 2003, and the Court being otherwise duly advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Defendant owes and shall pay to Plaintiff a refund of Michigan Single Business Tax and interest in the aggregate principal amount of $346,418.31 in Single Business Tax and interest paid under protest, plus additional statutory interest thereon until paid in full.

This Judgment resolves the last pending claim and closes the case.

Dated: ~~August~~ Sept. 2nd, 2003 /s/ P. Manderfield
Hon. Paula J.M. Manderfield

APPROVED AS TO FORM:

/s/ Glenn R. White
Glenn R. White

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

FLUOR ENTERPRISES, INC.

Plaintiff,

v

REVENUE DIVISION, DEPARTMENT OF TREASURY, STATE OF MICHIGAN,

Defendant. /

Case No. 02-27-MT

Honorable Paula M. Manderfield

PATRICK R. VAN TIFLIN (P26119)
DANIEL L. STANLEY (P57052)
Attorneys for Plaintiff
Honigman Miller Schwartz and Cohn LLP
222 North Washington Square
Suite 400
Lansing, MI 48933-1800
(517) 377-0702

GLENN R. WHITE (P53520)
JUDITH I. BLINN (P26678)
Michigan Department of Attorney General
Attorney for Defendant
Revenue Division
First Floor, Treasury Building
Lansing, MI 48922
(517) 373-3203 /

STIPULATION OF FACTS

NOW COMES Plaintiff, Fluor Enterprises, Inc., and Defendant, the Michigan Department of Treasury, by and

through their attorneys, and stipulate to the following facts:

1. Plaintiff, Fluor Enterprises, Inc. ("Fluor") is a California corporation and, during the time period relevant to this controversy, Fluor had its principal place of business in Irvine, California.

2. This case concerns Michigan Single Business Tax ("SBT") imposed upon Fluor by the Defendant, the Michigan Department of Treasury (the "Department") for fiscal years ending October 31, 1989 through October 31, 1994 (the "Years In Issue").

3. The dispute over the taxes for the Years In Issue concerns the proper interpretation of Section 53 of the Single Business Tax Act ("SBTA"), MCL § 208.53.

4. Fluor is a multinational engineering, construction, and technical service company.

5. During the Years In Issue, Fluor was paid for engineering, construction material procurement, construction management, and architectural design services, some of which related to real estate improvement projects ultimately constructed in Michigan.

6. Some of the receipts received by Fluor related to activities performed in Michigan such as construction management and construction material procurement activities performed by Fluor employees in Michigan. These receipts were reported by Fluor as Michigan receipts for SBT apportionment purposes and are not an issue in this case.

7. The receipts at issue in this case relate to receipts received by Fluor for engineering and architectural services performed by Fluor employees outside of Michigan that related to real estate improvement projects constructed in Michigan (the "Subject Receipts").

8. Fluor did not engage in engineering and/or architectural planning or design services within the state of Michigan.

9. Fluor engaged in engineering and/or architectural planning and design activities at its engineering facilities located in Greenville, South Carolina, Houston, Texas, Chicago, Illinois, and Irvine, California.

10. Fluor timely filed its SBT annual returns for the Years In Issue.

11. In its SBT returns for the Years In Issue, Fluor did not report the Subject Receipts as Michigan receipts because the activities to which those receipts were related were performed outside the state of Michigan.

12. The Department initiated an audit of Fluor and asserted that Fluor had underpaid its SBT liability. Fluor accepted some of the Department's adjustments. Fluor, however, disagreed with the auditor's position that SBTA Section 53(c) required that Fluor's receipts for engineering and architectural services performed outside of Michigan be considered as Michigan sales because the construction projects related to those receipts were located in Michigan.

13. Following the audit, the Department issued Fluor three Bills For Taxes Due (Intents to Assess) for the Years In Issue. In the first Bill, H635308 for SBT for taxable years 1989, 1990, and 1991, the Department assessed $133,601.00 in additional taxes. In the second

Bill, I492017 for SBT tax year 1993, the Department assessed $5,622.00 in additional taxes. In the third Bill, I494802, for tax years 1992 and 1994, the Department assessed $43,089.00 in additional taxes.

14. After receiving these Bills For Taxes Due (Intents To Assess), Fluor requested an informal conference with the Department's Hearings Division.

15. This informal conference was conducted by telephone on May 25, 1999 by Hearing Referee Kimberly Burzych, an attorney at law employed by the Hearing Division of the Department.

16. Following the informal conference, the Department's Referee issued a Recommendation to the Commissioner of Revenue. A copy of the Recommendation is attached hereto as Exhibit 1.

17. On October 23, 2001, Commissioner of Revenue June Summers Haas issued a Decision and Order of Determination (the "Order"), directing that the Bills for Taxes Due (Intents to Assess) be assessed as originally determined. A copy of the Order is attached hereto as Exhibit 2.

18. On November 5, 2001, following Commissioner Haas's Order, the Department issued three Bills for Taxes Due (Final Assessments). Under the Bills For Taxes Due (Final Assessments), the Department assessed Fluor total tax and interest of $343,340.96.

19. On December 3, 2001, Fluor paid $343,340.96 to the Department for these Bills for Taxes Due (Final Assessments) under protest.

20. On February 4, 2002, Fluor paid an additional $3,077.35 in interest related to the Bills for Taxes Due (Final Assessments) under protest.

21. Fluor brought this action to recover $346,618.31 in tax assessments and interest for the Years In Issue, paid under protest, plus additional statutory interest, costs and attorney fees.

22. If the Subject Receipts are not required to be reported as Michigan receipts in Fluor's SBT sales factor pursuant to SBTA Section 53(c), then Fluor is entitled to a refund of $346,418.31 in SBT and interest paid under protest, plus additional statutory interest thereon until paid in full.

23. The parties agree that either party may file and serve affidavits or documents in support of any factual material not inconsistent with the preceding recitations.

Respectfully submitted,

HONIGMAN, MILLER, SCHWARTZ
AND COHN LLP
Attorneys for Plaintiff

By: /s/ Patrick R. Van Tiflin
Patrick R. Van Tiflin (P26119)

Dated: May 6, 2003

MICHAEL A. COX
Attorney General
Attorney for Defendant

By: /s/ Glenn R. White
Glenn R. White (P53520)
Assistant Attorney General

Dated: May 5, 2003

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
REVENUE

Fluor Daniel, Inc. Joan A. Chapel, Esquire 3353 Michelson Drive, #551-M Irvine, CA 92698	Docket No. 19950036 Single Business Tax Account No. 95-2758280 Intents to Assess I494802, I492017 & H635308 Tax Period: Nov. 1988-Oct. 1994

TO: June Summers Haas
Commissioner of Revenue

FROM: Kimberly Burzych, Referee
Office Legal and Hearings

An informal conference was held in Lansing on May 25, 1999. Jennifer Payne and Julianna Dwyer appeared by telephone on behalf of the taxpayer and Stan Weber, Lillie Smith, and Edward Balido appeared by telephone on behalf of the Department.

Facts:

The taxpayer ("Fluor") is a subsidiary of Fluor Corp. (one of the world's largest international engineering, construction, maintenance and related technical services companies with an important investment in low-sulfur coal). Fluor is located in Irvine, California, and serves five broad market sectors (hydrocarbon, industrial, government, process, and power) that operate through twelve global business units focused on specific market opportunities.

Fluor was audited for the November 1, 1988 through October 31, 1994 period and a deficiency was found to exist. The deficiency was primarily due to: adjustments to the apportionment factor and to business income (additions due to an amended 1120 return); and adjustments in the area of compensation (FYE 10/89). In other words, the additional assessment resulted from an increase in the numerator of each year's sales factor to include in Michigan receipts revenues earned from planning and design services performed in states where Fluor has permanent home office locations.

The issue in this matter concerns the interpretation of MCL 208.53(c) and the fact that Fluor did not report revenue for work it performed outside Michigan (engineering and architectural services) though these were done for a Michigan project. The Department feels that the revenue is attributable to Michigan since the services were done for a Michigan project, but Fluor feels it is properly taxable or subject to tax in the states in which it was actually performed.

The Department cites MCL 208.53(c) as the authority for including the revenues from all activities related to Michigan clients, whether performed in Michigan or not as Michigan sales. It explains that MCL 208.53(c) was included in the Act due to a concern on the part of Michigan-based engineering and architectural firms that they would be at a competitive disadvantage with the inception of the SBT. They felt that outstate firms would be subject to a smaller tax burden because of normal UDITPA apportionment standards (attributing receipts from the performance of service based on cost of performance). Therefore, they recommended that a provision [section 53(c)] be added to the statute. Based on this historical

background, the Department concludes that any receipts for services related to Michigan construction activities are, by statute, Michigan receipts.

As mentioned earlier, Fluor argues the revenue is properly taxable or subject to tax in the states in which it was actually performed. It indicates, by the nature of the activity, construction management and construction are performed at the ultimate project location (which would be in Michigan for the projects under discussion here); however, the engineering and procurement is "office" work performed in Fluor's regional offices (typically Irvine, Chicago, or Greenville) and therefore not able to be included in the definition of "business activity." Because these are separate business activities (separately accounted for and involving different personnel), Fluor disagrees with the Department's decision to aggregate the costs and revenues of all projects for each client, and thereby attribute them to Michigan as one business activity.

Fluor also argues that it sees no guidance for the Department's interpretation of MCL 208.53(c). Instead of reading (c) as "receipts derived from services performed for planning or design **for** construction activities within Michigan", Fluor argues that (c) should be read as "receipts derived from services performed within Michigan (for planning, design, or construction activities)." It contends that the statute is reasonably interpreted as referring to planning within Michigan, design within Michigan, or construction activities within Michigan.

Additionally, Fluor argues in a letter sent after the informal conference that MCL 208.53(c) includes a conditional

statement and therefore it is not a directive. Fluor indicates:

> As a preliminary matter, Section 53(c) says "Sales, other than sales of tangible personal property, are in this state if . . . [r]eceipts derived from services performed for planning, design or construction activities within this state shall be deemed Michigan receipts." As written, and in accordance with standard rules of grammatical construction, this statement presents only the necessary condition that must be satisfied in order for a sale to be a Michigan sale. The statement does not itself direct that the receipts are Michigan receipts (i.e., there must be some further provision that provides the circumstances under which such receipts are deemed Michigan receipts). It is a fundamental rule of statutory construction that the legislature must be presumed to have intended the plain meaning expressed by the language it has chosen. The interpretation of Section 53(c) as a conditional statement *is* its plain meaning and must be presumed to represent legislative intent. It cannot be interpreted as a directive and still satisfy the plain meaning requirement. Accordingly, Fluor's interpretation of this section is that it does not require Fluor to include the Out-of-State Revenues in the Michigan sales factor numerator, but instead merely states the result if receipts from planning or design or construction activities within the state actually are deemed to be Michigan receipts in accordance with further guidelines.

Further, Fluor points out that MCL 208.53(c) states "receipts . . . shall be deemed Michigan receipts", however the statute does not indicate who does the "deeming" or under what circumstances. Since case law has held for the

taxpayer when statutory definitions do not provide clear guidance [*Showtime Entertainment Partnership*, 6 MTT 689 (1989)], Fluor feels it is entitled to relief.

Fluor also argues Section 53(c) is ambiguous and, because taxation statutes must be strictly construed, and all doubt, uncertainty, and ambiguity must be resolved in favor of the taxpayer, the issue must be resolved in Fluor's favor.

In its letter sent after the informal conference, Fluor also raises some constitutional concerns about the Department's interpretation:

> Second, any other interpretation of Section 53(c) would raise constitutional issues about its validity. Consider, for example, a situation in which an out-of-state company that has no nexus with Michigan provides planning and design services of the type at issue in this matter to another company that is constructing a facility in Michigan. Michigan's interpretation of Section 53 . . . would require that the revenues of the company supplying the planning and design be considered Michigan receipts. Because of the absence of nexus, this result clearly would be unconstitutional, yet it is the result that logically follows from the interpretation of Section 53(c) proposed during this audit. . . .
>
> Interpreting Section 53 to require Fluor to include the Out-of-State Revenues in the Michigan sales factor numerator would also raise constitutional issues under the fair apportionment requirement outlined by the U.S. Supreme Court in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). Specifically, Section 53 would fail the internal consistency test because it would result in multiple taxation in situations such as Fluor's if

> adopted by all states, rendering the statute unconstitutional. It is an established rule of statutory construction that where a statute is amendable [sic] to two differing interpretations, one which would render the statute unconstitutional and the other constitutional, the interpretation adopted *must* be the one that renders the statute constitutional . . .

In response, the Department raises a concern that the taxpayer's example is misleading:

> Fluor Daniel's attorney in the fifth paragraph of the letter gave an example that is misleading. In the example it was stated that an out-of-state company with no nexus in Michigan would have to file and report receipts derived from services performed for planning, design, or construction activities within this state as Michigan receipts which would be unconstitutional. This is not accurate since an out-of-state company without nexus in Michigan would NOT be required to file. Therefore, the receipts in that example would not be reported as Michigan receipts since no return is filed for lack of nexus.

Analysis and Conclusions of Law:

The single business tax ("SBT") is imposed on the adjusted tax base of every person with business activity in Michigan. MCL 208.31(1). In apportioning a taxpayer's tax base to Michigan for SBT Act purposes, the Act requires "multiplying the tax base by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3." MCL 208.45. The sales factor, delineated in MCL 208.51, consists of:

> . . . a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year.

Sales involving services are allocated based upon the provisions of MCL 208.53 which provides, in pertinent part:

> Sales . . . are in this state if . . .
>
> (a) the business activity is performed in this state;
>
> (b) a greater proportion of the business activity is performed in this state than is performed outside this state;
>
> (c) receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts.

MCL 208.53(a) and (b) are not at issue; however MCL 208.53(c) is.

The rules of statutory construction are well established. The foremost rule, and one's primary task in construing a statute, is to discern and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). This task begins by examining the language of the statute itself. If the language of the statute is not ambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. *Id.* The statutory language must be read and understood in its grammatical context,

unless it is clear that something different was intended. *Id.* at 237.

It is a general rule that relative and qualifying or modifying words, phrases, and clauses should be referred to the word, phrase, or clause with which they are grammatically connected. 73 Am Jr 2d §229, p 414. In construing statutes, qualifying words, phrases, and clauses are ordinarily confined to the last antecedent, or to the words and phrases immediately preceding. 73 Am Jr 2d §230, pp 414-415. The last antecedent, within the meaning of this rule, has been regarded as the last word that can be made an antecedent without impairing the meaning of the sentence. This rule of statutory construction, however, is not controlling or inflexible. The rule is not applicable where a further extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by the entire act. *Id.* at 415. It is also noted that common sense should be employed when construing a statute. *Panich v Iron Wood Products Corp*, 179 Mich App 136; 445 NW2d 795 (1989).

Applying these rules to the statute at issue, it is clear that the Legislature intended "within this state" to modify more than just "construction activities"; instead, the Legislature intended "within this state" to modify the entire phrase "planning, design, or construction activities". In fact, "activities" (like "within this state") modifies more than just "construction" – it, too, modifies the entire list. This Hearing Referee agrees with Fluor's interpretation of the statute. As argued by Fluor, MCL 208.53(c) should be read as "receipts derived from services performed within Michigan (for planning, design, or construction activities)".

If the Legislature wanted only construction activities modified by "within this state", it would have written (c) differently. For instance, it could have been drafted in the following manner: "receipts derived from services performed for construction activities within the state, or for planning activities, or for design activities shall be deemed Michigan receipts." It seems obvious that such an interpretation – deeming receipts derived for planning activities outside Michigan as Michigan receipts – was not desired.

When MCL 208.53(c) is read in its grammatical context there is no ambiguity. If there were ambiguity, however, the Hearing Referee would still have to rule for the taxpayer. The general rules is that " . . . in doubtful cases, revenue statutes must be construed against the taxing authority." *Bechtel v Treasury Dep't*, 128 Mich App 324, 329; 340 NW2d 297 (1983). See also *Ford Motor Co v Tax Comm*, 400 Mich 499, 506; 255 NW2d 608 (1977): "If tax laws are to be construed liberally in favor of the taxpayers, we cannot so strain the statute's clear meaning so as to give credence to defendant's arguments."

Recommendation:

I recommend that Intents to Assess I494802, I492017 and H635308 be cancelled in their entirety.

Respectfully submitted,

/s/ Kimberly Burzych
Kimberly Burzych, Referee
Office of Legal and Hearings

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
REVENUE

Fluor Daniel, Inc. Joan A. Chapel, Esquire 3353 Michelson Drive, #551-M Irvine, CA 92698	Docket No. 19950036 Single Business Tax Account No. 95-2758280 Intents to Assess: I494802, I492017 & H635308 Tax Periods: 10/89-10/91, 10/93

DECISION AND ORDER OF DETERMINATION

The Department, having reviewed the evidence and recommendations of the referee in the above captioned matter, and being advised in the premises; finds that a different disposition is required;

Accordingly, the attached statement includes the reasons and authority for the determination being made by the Department;

Now therefore it is ordered and determined that the proposed deficiency covering the period appearing on the respective notice of Intent to Assess I494802 shall be assessed as originally determined for tax in the amount of $43,089.00 and interest to be computed in accordance with sections 23 and 24 of Public Act 122 of 1941.

It is ordered and determined that the proposed deficiency covering the period appearing on the respective notice of Intent to Assess I492017 shall be assessed as originally determined for tax in the amount of $5,622.00

and interest to be computed in accordance with sections 23 and 24 of Public Act 122 of 1941.

It is ordered and determined that the proposed deficiency covering the period appearing on the respective notice of Intent to Assess H635308 shall be assessed as originally determined for tax in the amount of $133,601.00 and interest to be computed in accordance with sections 23 and 24 of Public Act 122 of 1941.

It is further ordered and determined that the Department shall issue final assessments against you for the tax and interest due. The tax due on these assessments will be subject to the accrual of such additional penalty and interest as is provided by Public Act 122 of 1941.

DATED: Oct. 23 2001

/s/ June Summers Haas
June Summers Hass
Commissioner of Revenue

CERTIFIED MAIL –
RETURN RECEIPT REQUESTED

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
REVENUE

Fluor Daniel, Inc. Joan A. Chapel, Esquire 3353 Michelson Drive, #551-M Irvine, CA 92698	Docket No. 19950036 Single Business Tax Account No. 95-2758280 Intents to Assess: I494802, I492017 & H635308 Tax Periods: 10/89-10/91, 10/93

REASONS AND AUTHORITY FOR THE DECISION OF THE REVENUE COMMISSIONER

This states the reason why the recommendation of Kimberly Burzych, Hearing Referee, to cancel Intents to Assess I494802, I492017, & H635308 has not been accepted.

FACTS

An audit was conducted in 1996/1997, which covered the tax periods November 1, 1988 through October 31, 1994. The audit revealed a total tax deficiency in the amount of $182,312.00. The primary reason for the tax deficiency was an increase in the numerator of each year's sales factor to include as Michigan receipts the revenues earned from planning and design services performed in states where the Petitioner (Fluor Daniel, Inc.) has permanent home office locations. The Petitioner contends that MCL 208.53(c) should be interpreted as including in gross receipts the actual planning and design services, which are actually performed within Michigan. Treasury contends

that the statute should be interpreted as including as Michigan revenue all planning and design services, wherever performed, if the ultimate project work is performed within Michigan.

ANALYSIS AND CONCLUSIONS OF LAW

MCL 208.31(1) provides in part; " . . . there is levied and imposed a specific tax upon the adjusted tax base of every person with business activity in this state that is allocated or apportioned to this state . . . " This statute upholds the Single Business Tax (SBT) of 2.3%. In arriving at the tax base, a taxpayer is required to either add or subtract certain items to its tax base.

In this instance, the particular adjustment to the Petitioner's tax base, at the time of the audit period, is found in MCL 208.53, which provides:

> Sales, other than sales of tangible personal property, are in this state if:
>
> (a) The business activity is performed in this state.
>
> (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.
>
> (c) Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts.

Because the two parties differ in their interpretation of this statute, it is appropriate to review the principles of statutory construction.

As was aptly stated in *Stratton-Cheeseman Management Co. v State of Michigan and Michigan Department of Treasury*, 159 Mich App 719, 407 NW2d 398, (1987):

> In construing statutes the following principles apply. The primary objective of judicial construction is to ascertain and give effect to the Legislature's intent. The language of the statute is the best source for ascertaining intent. *In re Condemnation of Lands*, 133 Mich App 207, 210-211; 349 NW2d 261 (1984), lv den 421 Mich 856 (1985). An act must be read in its entirety and the meaning given to one section arrived at after due consideration of the other sections so as to produce, if possible, a harmonious and consistent enactment as a whole. *King v Director of the Midland County Dept of Social Services*, 73 Mich App 253, 258; 251 NW2d 270 (1977). Long-standing administrative interpretations by those charged with administering a statute are entitled to considerable weight. See *People v Dunn*, 104 Mich App 419, 425; 304 NW2d 856 (1981); *Magreta v Ambassador Steel Co*, 380 Mich 513, 519; 158 NW2d 473 (1968). However, an administrative interpretation is not conclusive and cannot be used to overcome a logical reading of the statute. *People v Dunn, supra*, p 425. If an act is clear and unambiguous, then judicial construction or interpretation is unwarranted. *Lake Carriers' Ass'n v Director of the Dep't of Natural Resources*, 407 Mich 424, 429; 286 NW2d 416 (1979). If a statute is ambiguous or susceptible to two or more constructions that could cause reasonable minds to disagree as to its meaning, the statute

> must be interpreted. *Shelby Charter Twp v State Boundary Comm*, 425 Mich 50, 72; 387 NW2d 792 (1986).

In this instance, subsections (a) and (b) of MCL 208.53 are sourced from the Uniform Division of Income for Tax Purposes Act (UDITPA). However subsection (c) was added by the Legislature based upon a concern expressed by Michigan based engineering and architectural firms that they would be at a competitive disadvantage with out-of-state firms.

Treasury's position is that subsection (c) pertains to real property planning, design, engineering, architectural and construction activities. Sales of these types of services are attributed to the state where the construction activity (business activity) is to be performed. Receipts for construction related activities with a situs in other states by a Michigan based company subject to apportionment, cannot be attributed to Michigan. The legislative intent, which supports Treasury's position, is embodied in a letter dated July 17, 1975 from the Consulting Engineers of Michigan, Inc. to Senator John Bowman. This letter proposed the addition of subsection (c) and explains the amendment as follows:

> The purpose of this amendment is to increase the ability of the Department of Treasury to tax firms headquartered outside Michigan and designing projects for Michigan. This amendment would raise the tax base for firms headquartered outside Michigan so their tax base is more closely aligned with firms headquartered in Michigan. This amendment would allow Michigan firms to compete more equally with firms outside the state for Michigan projects. This amendment

> would allow the state to collect a greater tax on Michigan projects designed by out-of-state firms.

Thus, in examining the letter and the circumstances surrounding the adoption of subsection (c), it is apparent that the legislature intended for the statute to be read as a whole and subsection (c) to be interpreted as pulling in activities performed out of state for construction activities performed within the State of Michigan. The statute, as a whole is interpreted as stating that receipts, derived from services performed out of state, for planning, design or construction activities/business activities performed in the state are deemed Michigan receipts.

DECISION

Intents to Assess I494802, I492017, and H635308 are upheld in their entirety.

U.S. Const. art. 1, § 8

The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

Mich. Comp. Laws § 208.31 Specific tax on adjusted tax base; rates; "adjusted tax base" defined; tax imposed on privilege of doing business; reduction of adjusted tax base in lieu of reduction; limitation; applicability of subsection (4); effect of comprehensive annual financial report; annualized rate.

Sec. 31. (1) Except as provided in subsections (5) and (6), there is levied and imposed a specific tax upon the adjusted tax base of every person with business activity in this state that is allocated or apportioned to this state at the following rates for the specified periods:

(a) Before October 1, 1994, 2.35%.

(b) After September 30, 1994 and before January 1, 1999, 2.30%.

(c) Beginning January 1, 1999 and each January 1 after 1999, the rate under this subsection shall be reduced as provided in subsection (5).

(2) As used in this section, "adjusted tax base" means the tax base allocated or apportioned to this state pursuant to chapter 3 with the adjustments prescribed by sections 23 and 23b and the exemptions prescribed by section 35. If the adjusted tax base exceeds 50% of the sum of gross receipts plus the adjustments provided in section 23b(a) to (g), apportioned or allocated to Michigan with the apportionment fraction calculated pursuant to chapter 3, the

adjusted tax base may, at the option of the taxpayer, be reduced by that excess. If a taxpayer reduces the adjusted tax base under this subsection, the taxpayer is not entitled to the adjustment provided in subsection (4) for the same taxable year. This subsection does not apply to an adjusted tax base under section 22a.

(3) The tax levied under this section and imposed is upon the privilege of doing business and not upon income.

(4) In lieu of the reduction provided in subsection (2), a person may elect to reduce the adjusted tax base by the percentage that the compensation divided by the tax base exceeds 63%. The deduction shall not exceed 37% of the adjusted tax base. For purposes of computing the deduction allowed by this subsection, as effective for the respective tax year, compensation does not include amounts of compensation exempt from tax under section 35(1)(e). This subsection does not apply to an adjusted tax base under section 22a.

(5) If the comprehensive annual financial report of this state for a state fiscal year, published pursuant to section 494 of the management and budget act, 1984 PA 431, MCL 18.1494, reports an ending balance of more than $250,000,000.00 in the countercyclical budget and economic stabilization fund created under section 351 of the management and budget act, 1984 PA 431, MCL 18.1351, for that state fiscal year, the tax rate under this section shall be reduced by 0.1 percentage point on the January 1 following the end of the state fiscal year for which the report was issued.

(6) The department shall annualize the rate under this section as necessary, and the applicable annualized rate shall be imposed.

Mich. Comp. Laws § 208.41 Apportionment of tax base; business activities taxable within and without state.

Sec. 41. A taxpayer whose business activities are taxable both within and without this state, shall apportion his tax base as provided in this chapter.

Mich. Comp. Laws § 208.45 Apportionment of tax base to state.

Sec. 45. (1) For tax years beginning before January 1, 1991, all of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3.

(2) For tax years beginning after December 31, 1990 and before January 1, 1993, all of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a percentage, which is the sum of all of the following percentages:

(a) The property factor multiplied by 30%.

(b) The payroll factor multiplied by 30%.

(c) The sales factor multiplied by 40%.

(3) Subsection (2) does not apply for a tax year in which a deduction is not allowed under section 23(c).

(4) For tax years beginning after December 31, 1992 and before January 1, 1997 and for tax years beginning after December 31, 1996 and before January 1, 1998 if section 23(e) is not in effect, all of the tax base, other than the tax base derived principally from transportation, financial, or insurance carrier services or specifically allocated, shall be apportioned to this state by multiplying the tax base by a percentage, which is the sum of all of the following percentages:

(a) The property factor multiplied by 25%.

(b) The payroll factor multiplied by 25%.

(c) The sales factor multiplied by 50%.

* * *

Mich. Comp. Laws § 208.51 Sales factor.

Sec. 51. (1) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year.

(2) For a foreign person, the sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer in the United States during the tax year.

Mich. Comp. Laws § 208.52 Sales of tangible personal property in state; circumstances. Sec. 52. Sales of tangible personal property are in this state in any of the following circumstances:

(a) For tax years beginning before January 1, 1998, the property is shipped or delivered to a purchaser, other than the United States government, within this state regardless of the free on board point or other conditions of the sales.

(b) For tax years beginning on and after January 1, 1998, the property is shipped or delivered to any purchaser within this state regardless of the free on board point or other conditions of the sales.

(c) For tax years beginning before January 1, 1998, the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the purchaser is the United States government, or the taxpayer is not taxable in the state of the purchaser. For the purposes of this subdivision only, "state" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or political subdivision thereof.

Mich. Comp. Laws § 208.53 Sales other than of tangible personal property in state; conditions.

Sec. 53. Sales, other than sales of tangible personal property, are in this state if:

(a) The business activity is performed in this state.

(b) The business activity is performed both in and outside this state and, based on costs of performance, a

greater proportion of the business activity is performed in this state than is performed outside this state.

(c) Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts.

65

(2)

Supreme Court, U.S.
FILED
AUG 30 2007
OFFICE OF THE CLERK

No. 07-149

In the Supreme Court of the United States

FLUOR ENTERPRISES, INC.,
Petitioner,

v

REVENUE DIVISION OF THE DEPARTMENT OF TREASURY, STATE OF MICHIGAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF IN OPPOSITION

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Ross Bishop
Assistant Attorney General
Attorneys for Respondent

QUESTIONS PRESENTED

Section 53 (c) of the Michigan Single Business Tax Act, MCL 208.53(c), repealed effective December 31, 2007, provides that receipts derived from services performed outside Michigan for construction activities within Michigan are considered Michigan receipts for tax apportionment purposes. Does § 53(c) violate the Commerce Clause, US Const, art I, § 8, cl 3?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 2

ARGUMENT 4

MCL 208.53(c) Does Not Violate the Principle of Internal Consistency 5

MCL 208.53(c) Does Not Violate the Principle of External Consistency 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases

American Trucking Ass'n v Scheiner,
483 US 266; 107 S Ct 2829; 97 L Ed 2d 226 (1987)..... 5

Armco Inc v Hardesty,
467 US 638; 104 S Ct 2620; 81 L Ed 2d 540 (1984)..... 5

Complete Auto Transit, Inc v Brady, 430 US 274, 279; 97
S Ct 1076; 51 L Ed 2d 326 (1977)..... 3

Container Corp v Franchise Tax Bd,
463 US 159; 103 S Ct 2933; 77 L Ed 2d 545 (1983)..... 5

Goldberg v Sweet,
488 US 252 (1989)..... 7

Oklahoma Tax Commission v Jefferson Lines,
514 US 175; 115 S Ct 1331; 131 L Ed 2d 261 (1995).... 6, 7

Trinova Corp v Michigan Treasury Dept,
498 US 358; 111 S Ct 818; 112 L Ed 2d 884 (1991)..... 7

Statutes

MCL 208.53 1

MCL 208.53(c)..... passim

MCL 600.6401 et seq. 2

Michigan Public Act 235 of 2006 5

Constitutional Provisions

U S Const, art I, § 8, cl 3 3

OPINIONS BELOW

The opinion of the Michigan Supreme Court (Pet App. 1-28) is reported at 477 Mich 170, 730 NW2d 722 (2007). The opinion of the Michigan Court of Appeals (Pet App. 30-49) is reported at 265 Mich App 711, 697 NW2d 539 (2005).

JURISDICTION

The judgment of the Michigan Supreme Court was entered on May 2, 2007. The petition for a writ of certiorari was filed on July 31, 2007. The jurisdiction of this Court is invoked under 28 USC § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Michigan Compiled Laws, MCL 208.53 (repealed by 2006 Public Act 325, effective December 31, 2007):

> Sales, other than sales of tangible personal property, are in this state if:
>
> (a) The business activity is performed in this state.
> (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.
> (c) Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts.

STATEMENT

1. The parties to this dispute executed a Stipulation of Facts used by courts below to decide this matter. Pet App 53-57. In particular, the Stipulation of Facts indicated that Petitioner Fluor is a multi-national engineering, construction, and technical service company with its principal place of business in Irvine, California. Pet App 54, ¶ 1, 4. At issue are services Fluor performed for Michigan construction projects. Pet App 55, ¶ 7. Fluor performed construction management and construction material procurement activities in Michigan for these projects. Pet App 54, ¶ 6. It also conducted engineering and architectural services for Michigan projects at Fluor facilities outside of Michigan. Pet App 55, ¶ 7. A Single Business Tax audit of Fluor by Respondent Michigan Department of Treasury revealed that Fluor, in determining the sales factor for apportionment purposes, had counted its management and procurement activities in Michigan as Michigan sales but had neglected to include engineering and architectural services performed for Michigan construction projects at Fluor California offices as Michigan sales. Pet App 55, ¶ 12. As a result of the Single Business Tax audit, Fluor was assessed for the deficiency for tax in the amount of $182,312.00, and interest of $161,028.96. Pet App 13-14, ¶ 13. Fluor paid the assessment under protest and sought a refund of $343,618.31 plus additional accrued interest. Pet App 57, 21.

2. Fluor then filed an appeal in the Michigan Court of Claims.[1] The Department of Treasury's position was that for tax apportionment purposes, § 53(c) of the Michigan Single Business Tax Act, "SBTA," MCL 208.53(c), mandated that Fluor treat receipts for services obtained outside Michigan, but used for Michigan construction projects, as Michigan sales. Fluor argued that Michigan's position was not supported by the statutory language. Fluor also argued that the position taken by the Michigan Department of Treasury, if correct, violated the

---

[1] The Michigan Court of Claims was created by the Michigan Legislature with exclusive jurisdiction to hear and determine all claims against the State. MCL 600.6401 et seq.

Commerce Clause of the U S Constitution.[2] At the Court of Claims the parties filed cross motions for summary disposition. The Court of Claims ultimately denied the Department of Treasury's motion and granted Fluor's, holding that the Department of Treasury's proposed statutory interpretation was incorrect, as § 53(c) of the SBTA limited Michigan sales to services performed in Michigan. Pet App 50-52.

3. The Michigan Department of Treasury filed its claim of appeal to the Michigan Court of Appeals. The Michigan Court of Appeals reversed the State law determination of the Michigan Court of Claims that § 53(c) of the SBTA limited Michigan sales to services performed in Michigan for construction projects in Michigan. Pet App 30-49. Having found that the Court of Claims had erroneously interpreted the State statute in question, the Michigan Court of Appeals then examined Fluor's Commerce Clause challenge to the tax at issue.[3] The Michigan Court of Appeals noted that an examination of a Commerce Clause challenge to a State tax encompasses a review of the four-part test set forth by this Court in the case of *Complete Auto Transit, Inc v Brady*,[4] which provides that a State tax is constitutionally valid under the Commerce Clause if the tax[5]:

> (1) is applied to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state.

As Fluor had only raised a challenge in its original complaint to the tax under the first two prongs of this test, the Court of

---

[2] U S Const, art I, § 8, cl 3

[3] Fluor's Commerce Clause challenge had not been examined by the lower court as that court had accepted Fluor's proposed statutory interpretation of § 53(c) of the SBTA.

[4] *Complete Auto Transit, Inc v Brady*, 430 US 274; 97 S Ct 1076; 51 L Ed 2d 326 (1977).

[5] *Complete Auto Transit, Inc*, 430 US at 279

Appeals only examined the first and second prongs, finding that the tax at issue was applied to an activity having a substantial nexus with the taxing State but that the tax at issue was not "fairly apportioned." Pet App 47-49.

In determining whether the tax at issue was "fairly apportioned" so as to pass a Commerce Clause challenge, the Court of Appeals correctly noted that two components must be satisfied: the tax must be both "internally" and "externally" consistent. "Internal consistency" means that "a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result[.]" "External consistency" examines whether the choice of factors used in apportionment "reasonably reflects the in-State component of the activity being [apportioned]." Pet App 47. As Fluor did not challenge the external consistency component, the Court of Appeals examined only the internal consistency component, finding that the tax at issue failed the internal consistency test.[6] Pet App 48-49. The Michigan Court of Appeals denied the Department's motion for reconsideration. Pet App 29.

4. Both parties filed applications for leave to appeal to the Michigan Supreme Court, which were granted. The Court issued majority and concurring opinions, Pet App 1-28, in which all seven Justices of the Michigan Supreme Court agreed, albeit for different reasons, that the State law determination of the Michigan Court of Appeals regarding the interpretation to be given § 53(c) of the SBTA was correct. All seven Justices also agreed that statute did not violate the Commerce Clause.

ARGUMENT

The opinion of the Michigan Supreme Court is correct and does not conflict with a decision of this Court, any decision of a United States Court of Appeals, or any decision of another State

---

[6] For all practical purposes the "internal consistency" test was raised *sua sponte* by the Court of Appeals in its April 14, 2005 Opinion. Neither party really briefed or argued the issue before that time.

court of last resort. While the opinion does deal with a federal question—whether a State tax conflicts with the Commerce Clause—the Michigan Supreme Court decided the question correctly. The situation is not likely to recur, since the statute at issue has been repealed.[7]

MCL 208.53(c) Does Not Violate the Principle of Internal Consistency

As recognized by both the majority and concurring opinions of the Michigan Supreme Court, MCL 208.53(c) does not violate the Commerce Clause, as the services that it characterizes as Michigan sales for apportionment purposes are those services performed for construction projects that take place in Michigan. The statute treats services performed for a construction project as sales of the State where the construction project takes place. Because of this treatment, it is clear that § 53(c) meets the internal consistency test first articulated by this Court in *Container Corp v Franchise Tax Bd,*[8] in which this Court cited "internal consistency" as an analytical tool to determine whether a State's apportionment formula was fair. Under the internal consistency test "the [apportionment] formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed."[9] In *American Trucking Ass'n v Scheiner,* this Court explained[10]:

> To pass the 'internal consistency' test, a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'

---

[7] Michigan Public Act 235 of 2006, effective Decemeber 31, 2007.

[8] *Container Corp v Franchise Tax Bd,* 463 US 159; 103 S Ct 2933; 77 L Ed 2d 545 (1983).

[9] *Container Corp,* 463 US at 169.

[10] *American Trucking Ass'n v Scheiner,* 483 US 266, 284; 107 S Ct 2829; 97 L Ed 2d 226 (1987), quoting *Armco Inc v Hardesty,* 467 US 638, 644; 104 S Ct 2620; 81 L Ed 2d 540 (1984).

The internal consistency test was intended to measure whether interstate commerce was burdened if every State adopted the same type of tax. In *Oklahoma Tax Commission v Jefferson Lines*, this Court reiterated that the internal consistency test examined the form and structure of a tax[11]:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, **but simply looks to the structure of the tax at issue** to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

In the present case, as recognized by both the majority and concurring opinions of the Michigan Supreme Court, because § 53(c) considers services that occur outside Michigan as Michigan sales only when they relate to Michigan construction projects, if every other State had a tax similar to Michigan's Single Business Tax, those other States also would include within their tax bases only those services relating to construction projects in their respective States. For example, if California had a tax similar to Michigan's Single Business Tax and if services for a construction project in California were obtained in Michigan for that project, the services would be included in California's sales and excluded

---

[11] *Oklahoma Tax Commission v Jefferson Lines*, 514 US 175, 185; 115 S Ct 1331; 131 L Ed 2d 261 (1995) (emphasis added).

from Michigan's. Because the sales for the services are sourced to the State where the construction project takes place, there is no possibility of multiple taxation and thus no violation of the internal consistency test. Under the internal consistency test, if other States adopted a provision like § 53(c), they too would source to themselves the services performed for construction activities in their States. The Michigan Supreme Court construed § 53(c) to the effect that receipts derived from services performed for construction projects in other States are receipts included in the sales apportionment factor of the State where the construction occurs. Such construction renders the statute constitutional.

MCL 208.53(c) Does Not Violate the Principle of External Consistency

At pages 14-15 of its Petition for Writ of Certiorari, Fluor raises the issue of external consistency. Whether a State tax meets the external consistency test relies on whether that State's tax "reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State"[12] and "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed."[13] The Michigan tax at issue passes the external consistency test because MCL 208.53(c) includes within its apportionment formula only those receipts for services performed out-State that are in furtherance of in-State construction projects. A construction project is made up of more than just steel and concrete; it also includes, as in Fluor's case, services purchased to complete and coordinate the actual construction activity. This Court has recognized that Michigan's Single Business Tax is a "value-added" tax that is a measure of a firm's total business activity.[14] Because the tax is a measure of total business activity, a construction project in Michigan is measured by more than just the value of the component parts of

---

[12] *Jefferson Lines*, 514 US at 185.

[13] *Goldberg v Sweet*, 488 US 252, 262 (1989).

[14] *Trinova Corp v Michigan Treasury Dept*, 498 US 358, 364; 111 S Ct 818; 112 L Ed 2d 884 (1991).

the construction. That project also contains value, added to Michigan's economy, attributable to the services purchased to complete that Michigan construction project. The fact that § 53(c) includes in the apportionment formula the out-State services involved in completion of that Michigan construction project simply recognizes economic reality and correctly apportions that part of a taxpayer's tax base to Michigan. Section 53(c) does not violate the external consistency test.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
Telephone: (517) 373-1124

Ross Bishop
Assistant Attorney General
Attorneys for Respondent

Dated: August, 2007